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"Cracking" the Code: Interpreting Sentence Reduction Requirements in Favor of Eligibility for Crack Cocaine Offenders Who Avoided a Mandatory Minimum for Their Substantial Assistance to Authorities

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"CRACKING" THE CODE: INTERPRETING SENTENCE REDUCTION REQUIREMENTS IN FAVOR OF ELIGIBILITY FOR CRACK COCAINE OFFENDERS WHO AVOIDED A MANDATORY MINIMUM FOR THEIR SUBSTANTIAL ASSISTANCE TO AUTHORITIES

Abstract: In 2010, the Fair Sentencing Act ("FSA") increased the quantities triggering mandatory minimums for crack cocaine offenses and directed the U.S. Sentencing Commission ("USSC") to make similar reductions to the crack cocaine guideline ranges. After the USSC made these changes retroactive, offenders sentenced in accordance with the previous scheme sought sentence reductions. Due to the circuit courts' differing interpretations of the eligibility requirements for a reduction, similarly situated offenders who avoided a mandatory minimum for performing substantial assistance to authorities have experienced different outcomes. This Note argues that courts should consistently hold such offenders eligible for retroactive sentencing reductions because this interpretation comports with the text of the U.S. Sentencing Guidelines and furthers the policy goals behind the FSA, the USSC, and the criminal justice system in general.

INTRODUCTION

Damon Joiner and Richard Roe both pled guilty to distributing crack cocaine in 2007 and 2008 respectively.[1] Both were caught with over one hundred grams of the highly addictive drug, charged with similar offenses, and received comparable sentences.[2] Both had prior felony drug convictions.[3] As such, both were sentenced in accordance with the harsher crack cocaine-sentencing scheme in effect before passage of the Fair Sentencing Act of 2010 ("FSA").[4] In light of

[1] United States v. Joiner, 727 F.3d 601, 602 (6th Cir. 2013); United States v. Savani, 733 F.3d 56, 59 (3d Cir. 2013) (combining the cases of Albert Savani, Sean Herbert, and Richard Roe, which had nearly identical fact patterns). Joiner pled guilty to distribution and possession with intent to distribute 129.77 grams of crack cocaine. *Joiner*, 727 F.3d at 602. Roe pled guilty to distributing 189.6 grams of crack cocaine. *Savani*, 733 F.3d at 59.

[2] *See Joiner*, 727 F.3d at 602–03; *Savani*, 733 F.3d at 59–60. Joiner received a sentence of 107 months imprisonment. *Joiner*, 727 F.3d at 603. Roe received a sentence of ninety-six months imprisonment. *Savani*, 733 F.3d at 60.

[3] *Joiner*, 727 F.3d at 602 (discussing Joiner's criminal history category V); *Savani*, 733 F.3d at 59–60 (outlining Roe's criminal history category V).

[4] *See* Fair Sentencing Act of 2010, Pub. L. 111-220, 124 Stat. 2372, 2372 (codified at 21 U.S.C. § 841 (2012)); *Joiner*, 727 F.3d at 603; *Savani*, 733 F.3d at 60. The FSA increased the quantity of crack cocaine necessary to trigger the mandatory minimum penalties of 120 months—or 240 months

the lower guideline sentencing ranges for crack cocaine offenses prompted by the FSA, Roe is eligible for a sentence reduction.[5] Joiner, however, is not.[6]

In 1984, Congress created the U.S. Sentencing Commission ("USSC") to prevent exactly this type of injustice between Joiner and Roe.[7] Congress tasked the USSC with ensuring certainty and fairness in federal sentencing and avoiding unwarranted disparities for similarly situated defendants.[8] Nearly forty years later, however, the respective cases of Joiner and Roe demonstrate that unfairness and arbitrariness still abound in the federal sentencing scheme for crack cocaine offenses.[9]

This disparity stems from divergent interpretations of the eligibility requirements for resentencing under the U.S. Sentencing Guidelines ("USSG").[10] When the USSC lowers a guideline range through an amendment to the USSG and makes the amendment retroactive, eligible defendants sentenced under the

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for a defendant convicted of a prior felony drug offense—under the Controlled Substances Act ("CSA") from 50 to 280 grams. Fair Sentencing Act of 2010, § 2(a)(1)–(2); Controlled Substances Act, 21 U.S.C. § 841(b)(1)(A)(iii) (2012). The FSA also instructed the U.S. Sentencing Commission ("USSC") to lower the guideline ranges for crack cocaine offenses in accordance with the statutory changes. Fair Sentencing Act of 2010, § 8.

[5] *Savani*, 733 F.3d at 67.

[6] *Joiner*, 727 F.3d at 609. The disparity stems from divergent interpretations of the two eligibility requirements for sentence reductions. *See infra* notes 118–201 and accompanying text (discussing the Sixth and D.C. Circuits' differing interpretations of the "based on" and "applicable guideline range" requirements for sentence reductions involving mandatory minimums and substantial assistance departures).

[7] *See* Sentencing Reform Act of 1984, Pub. L. 98-473, § 991(a)–(b)(1)(B), 98 Stat. 1987, 2017 (codified as amended at 18 U.S.C. §§ 3551–3742 (2012); 28 U.S.C. §§ 991–998 (2012)) (establishing the USSC with the purpose of "provid[ing] certainty and fairness in . . . sentencing [and] avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct").

[8] *See id.*

[9] *See* Tyler B. Parks, Note, *The Unfairness of the Fair Sentencing Act of 2010*, 42 U. MEM. L. REV. 1105, 1135–36 (2012) (arguing that courts should apply the FSA retroactively or Congress should amend the FSA to make it retroactive to reduce unwarranted sentencing disparities between crack cocaine offenders sentenced before and after the FSA); Evan R. Kreiner, Note, *Whose Applicable Guideline Range Is It Anyway? Examining Whether Nominal Career Offenders Can Receive Sentence Modifications Based on Retroactive Reductions in the Crack Cocaine Guidelines*, 112 COLUM. L. REV. 870, 884–85 (2012) (examining a circuit split over whether "nominal career offenders" are eligible for sentence reductions in light of subsequently lowered guideline ranges for crack cocaine offenses after the FSA). *Compare Joiner*, 727 F.3d at 609 (finding a defendant ineligible for a sentence reduction), *with Savani*, 733 F.3d at 67 (finding a similarly situated defendant eligible for a sentence reduction).

[10] *Compare Joiner*, 727 F.3d at 609 (finding a defendant ineligible for resentencing because Amendment 750 to the USSG did not have the effect of lowering his "applicable guideline range"), *and* United States v. Williams, 512 F. App'x 594, 600 (6th Cir. 2013) (finding a defendant ineligible for a sentence reduction because his sentence was not "based on" a subsequently lowered guideline range), *with In re* Sealed Case, 722 F.3d 361, 366 (D.C. Cir. 2013) (finding a similarly situated defendant eligible because his sentence *was* "based on" the subsequently lowered range and Amendment 750 *did* have the effect of lowering his "applicable guideline range").

previous scheme may seek a sentence reduction.[11] For eligibility, the defendant's sentence must have been "based on" a guideline range subsequently lowered by the USSC, and the amendment to the USSG must have the effect of lowering the defendant's "applicable guideline range" at original sentencing.[12]

The circuit courts disagree as to whether a defendant who avoided a mandatory minimum due to a departure for his or her substantial assistance to authorities meets these requirements.[13] The issue centers on the meaning of the "based on" and "applicable guideline range" language.[14] The Sixth Circuit has held that a defendant's sentence in these situations is not "based on" the subsequently lowered guideline range, because the sentencing judge departed from the mandatory minimum and not the guideline range to account for a defendant's substantial assistance to authorities.[15] Conversely, the D.C. Circuit has held that a defendant's sentence *is* "based on" the guidelines range, because substantial assistance departures "waive" the mandatory minimum and allow the sentencing judge to consider the guideline range in imposing a sentence.[16] Similarly, as to the second requirement, the Sixth Circuit has held that a USSG amendment does not have the effect of lowering the defendant's "applicable guideline range" because the mandatory minimum becomes the "applicable guideline range."[17] The

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[11] *See* 18 U.S.C. § 3582(c)(2); United States v. Ortiz, 962 F. Supp. 2d 565, 570 (S.D.N.Y. 2013) (granting a reduction to the defendant's sentence pursuant to § 3582(c)(2) after a retroactive amendment to the USSG lowered his guideline range); U.S. SENTENCING GUIDELINES MANUAL § 1B1.10 (2014), *available at* http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2014/GLMFull.pdf, *archived at* http://perma.cc/P3Z7-SDCU.

[12] *See* 18 U.S.C. § 3582(c)(2); U.S. SENTENCING GUIDELINES MANUAL, *supra* note 11, § 1B1.10(a)(2)(B). For a prisoner to be eligible for a sentence reduction, Congress has stated that the prisoner's sentence must have been "based on" a subsequently lowered guideline range and the reduction must be consistent with policy statements promulgated by the USSC. 18 U.S.C. § 3582(c)(2). The relevant policy statement states a defendant cannot receive a sentence reduction if the USSG amendment did not have the effect of lowering the defendant's "applicable guideline range" at their original sentencing. U.S. SENTENCING GUIDELINES MANUAL, *supra* note 11, § 1B1.10(a)(2)(B).

[13] *See infra* notes 118–201 and accompanying text (describing the D.C. Circuit's view that a defendant's sentence is "based on" the USSG and an amendment has the effect of lowering his or her "applicable guideline range" when he or she avoided a mandatory minimum for helping authorities, as well as the Sixth Circuit's contrary interpretation).

[14] *Compare Joiner*, 727 F.3d at 609 (holding a defendant ineligible for a sentence reduction because his sentence was not "based on" the USSG), *and Williams*, 512 F. App'x at 600 (holding a defendant ineligible because an amendment to the USSG did not have the effect of lowering his "applicable guideline range"), *with In re Sealed Case*, 722 F.3d at 366 (holding a similarly situated defendant eligible because his sentence was "based on" the USSG and an amendment had the effect of lowering his "applicable guideline range").

[15] *See Williams*, 512 F. App'x at 599–600 (noting that a defendant's sentence was "in fact" based on the offense level derived from the mandatory minimum, rather than his base offense level, rendering him ineligible for a sentence reduction).

[16] *See In re Sealed Case*, 722 F.3d at 366 (stating that "the appellant's guideline range was the basis for his sentence because his mandatory minimum 'no longer applied'").

[17] *See Joiner*, 727 F.3d at 609 (holding that Amendment 750 amended the defendant's base offense level under USSG § 2D1.1—not his offense level derived from the mandatory minimum—rendering him ineligible for a sentence reduction).

D.C. Circuit, however, has held a defendant's "applicable guideline range" remains the guideline range regardless of the mandatory minimum, which the amendment *does* have the effect of lowering.[18]

Divergent interpretations of these requirements determine whether prisoners who provided substantial assistance to authorities may seek further sentence reductions.[19] Because of these divergent approaches, Roe was eligible for a sentence reduction, but Joiner was not.[20] Conflicting interpretations have led to unwarranted disparities like those between Joiner and Roe, which Congress specifically created the USSC to prevent.[21]

This Note argues that courts should interpret the eligibility requirements for sentence reductions in favor of eligibility for crack cocaine offenders who avoided a mandatory minimum for their substantial assistance to authorities.[22] This interpretation best comports with the text of the USSG, the goals behind the FSA, and the purpose of the USSC.[23] Part I provides an overview of the USSG, describes the changing sentencing schemes for crack cocaine offenses, and outlines the eligibility requirements for sentence reductions.[24] Part II discusses the divergent interpretations of the eligibility requirements for sentencing reductions when a defendant avoids a mandatory minimum for his or her substantial assistance to authorities.[25] Part III then argues that the text of the USSG and the policy goals behind the FSA and the USSC support eligibility for retroactive sen-

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[18] *See In re Sealed Case*, 722 F.3d at 368 ("[W]ithout the bar of the mandatory minimum, no provision kept Amendment 750 from having 'the effect of lowering' the appellant's applicable guideline range, leaving the appellant eligible under the policy statement to pursue a sentence reduction.").

[19] *Compare Joiner*, 727 F.3d at 609 (holding that Amendment 750 had the effect of lowering the defendant's base offense level, not his "applicable guideline range" after accounting for the mandatory minimum, rendering him ineligible for a sentence reduction), *and Williams*, 512 F. App'x at 600 (finding a defendant's sentence was based on his base offense level, not the mandatory minimum, rendering him ineligible for a sentence reduction), *with In re Sealed Case*, 722 F.3d at 366 (finding a similarly situated prisoner eligible because Amendment 750 had the effect of lowering his guideline range even after consideration of the mandatory minimum and because his sentence was "based on" his guideline range after the substantial assistance departure "waived" the mandatory minimum).

[20] *Joiner*, 727 F.3d at 609; *Savani*, 733 F.3d at 67. Roe's ninety-six month sentence may be reduced, whereas Joiner must serve the remainder of his 107-month sentence. *See Joiner*, 727 F.3d at 603, 609; *Savani*, 733 F.3d at 60, 67.

[21] *See* 28 U.S.C. § 991(b)(1)(B) (2012); *Joiner*, 727 F.3d at 609; *Savani*, 733 F.3d at 67; Joshua D. Asher, *Unbinding the Bound: Reframing the Availability of Sentence Modifications for Offenders Who Entered into 11(c)(1)(c) Plea Agreements*, 111 COLUM. L. REV. 1004, 1008–09 (2011) (noting that Congress sought to establish coordinated statutory authority for sentencing, reduce unwarranted disparities among similarly situated defendants, and generate research on criminal behavior punishment through the Sentencing Reform Act ("SRA")).

[22] *See infra* notes 202–271 and accompanying text.

[23] *See infra* notes 202–271 and accompanying text.

[24] *See infra* notes 27–117 and accompanying text.

[25] *See infra* notes 118–201 and accompanying text.

tencing reductions for crack cocaine offenders who avoided a mandatory minimum because of their substantial assistance to authorities.[26]

I. CRACK COCAINE SENTENCING IN THE UNITED STATES: THE USSG, THE HISTORY OF CRACK COCAINE, AND REFORMS AFTER THE FSA

This Part provides an overview of the USSG, the history of crack cocaine sentences, and the sentence reductions fostered by the FSA, which Congress intended to reform crack cocaine sentences both prospectively and retroactively.[27] Section A explores the USSG and some of the factors that may lead to deviations from them in individual cases.[28] Section B discusses crack cocaine specifically, and highlights the historic and ongoing sentencing disparity between crack cocaine and powder cocaine.[29] Section C then examines the FSA and how it can be used to retroactively reduce crack cocaine sentences.[30]

A. Overview of the USSG & Potential Deviations from the USSG

On October 12, 1984, Congress created the USSC with the passage of the Sentencing Reform Act of 1984 ("SRA").[31] In doing so, Congress sought to establish uniform federal sentencing policies, ensure certainty and fairness in sentencing, and avoid unwarranted disparities in sentencing for similarly situated defendants.[32] To achieve these goals, Congress tasked the USSC with promulgating a uniform set of regulations to guide courts in making sentencing calculations.[33] The USSG, first published in 1987, is the product of these efforts.[34]

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[26] *See infra* notes 201–271 and accompanying text.

[27] *See infra* notes 28–117 and accompanying text.

[28] *See infra* notes 31–69 and accompanying text.

[29] *See infra* notes 70–100 and accompanying text.

[30] *See infra* notes 101–117 and accompanying text.

[31] Sentencing Reform Act of 1984, Pub. L. 98-473, § 991, 98 Stat. 1987, 2017 (codified as amended at 18 U.S.C. §§ 3551–3742 (2012); 28 U.S.C. §§ 991–998 (2012)).

[32] *See id.* § 991(b)(1)(B) (noting the goals of the USSC to "provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices").

[33] *Id.* § 994(a)(1) (describing the Commission's overarching duty to "promulgate and distribute to all courts of the United States and to the United States Probation System guidelines . . . for use [by] a sentencing court in determining the sentence to be imposed in a criminal case"). Congress also tasked the USSC with issuing policy statements, periodically reviewing and revising the USSG, and measuring the effectiveness of current sentencing, penal, and correctional practices. *Id.* §§ 991(b)(2), 994(a)(2)–(3), (n).

[34] U.S. SENTENCING GUIDELINES MANUAL, *supra* note 11, § 1A1.2. The USSC organized the USSG into three parts: sentencing guidelines, policy statements, and official commentary from the USSC. *See id.* § 1A3.1.

This Section provides an overview of the USSG and how federal courts use them in imposing a sentence.[35] Subsection 1 outlines the general structure of the USSG.[36] Subsection 2 then explains how courts can or are forced to deviate from the USSG.[37]

1. The Structure of the USSG

The USSG prescribe sentencing ranges for all federal crimes, accounting for the severity of the crime, the defendant's criminal history, and a variety of aggravating and mitigating factors.[38] The USSG assign each crime an "offense level" based on the seriousness of the crime from one (least serious) to forty-three (most serious).[39] Courts may adjust this level for aggravating or mitigating circumstances, such as the defendant's degree of involvement, the number of victims, and acceptance of responsibility.[40] The USSG also assign each defendant a criminal history category from I to VI based on "points" calculated using the defendant's prior convictions from zero (category I) to thirteen or more (category VI).[41]

A single table provides the sentencing ranges for all federal crimes based on a defendant's offense level and criminal history category.[42] The vertical axis contains offense levels one to forty-three, and the horizontal axis contains criminal history categories I–VI.[43] After calculating the offense level and criminal history category for a particular defendant using the USSG's provisions, courts find where the two intersect on the table and impose a sentence within the pre-

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[35] *See infra* notes 38–69 and accompanying text.

[36] *See infra* notes 38–54 and accompanying text.

[37] *See infra* notes 55–69 and accompanying text.

[38] *See* U.S. SENTENCING GUIDELINES MANUAL, *supra* note 11, § 1B1.1(a)(1)–(8) (listing applications steps, including determination of the offense level based on the seriousness of the offense, the defendant's criminal history category, and adjustments for aggravating or mitigating circumstances).

[39] *See id.* § 2, introductory cmt. For example, second-degree murder has an offense level of thirty-eight, whereas trespassing has an offense level of four. *Compare id.* § 2A1.2(a) (explaining the offense level of second-degree murder), *with id.* § 2B2.3(a) (describing the offense level of trespassing).

[40] *See id.* § 3A–3E (outlining the sentencing guidelines for victim-related adjustments, role in the offense, obstruction and related adjustments, multiple counts, and acceptance of responsibility). For example, if the defendant used a minor under the age of eighteen to commit the crime, the offense level is increased by two. *See id.* § 3B1.4; *see also infra* notes 55–69 (describing other reasons courts may deviate from the USSG).

[41] U.S. SENTENCING GUIDELINES MANUAL, *supra* note 11, §§ 4A1.1, 5A. Defendants receive one point for each prior conviction, up to four points. *Id.* § 4A1.1(c). Additional points account for the seriousness of the prior convictions. *See id.* § 4A1.1(a), (d) (adding points for longer sentences or for offenses committed while under probation, parole, or other supervisory sentences).

[42] *See id.* § 5A, cmt.1.

[43] *Id.* § 5A.

scribed range.[44] Finally, courts consider options for imposing a fine, a probated sentence, or any other sentencing conditions, which includes adherence to statutory mandatory minimum sentences.[45]

The SRA directs courts to consider a variety of factual and policy concerns in addition to those specified in the USSG when imposing a sentence.[46] According to the SRA, sentences must reflect the goals of the criminal justice system: deterrence, proportionality, rehabilitation, and protection of the public.[47] These are sometimes referred to as the § 3553(a) factors.[48] Although courts must consider these factors, the SRA nonetheless instructs courts to impose a sentence within the range calculated under the USSG.[49] Courts may depart from the range given the presence of aggravating or mitigating circumstances that the USSC did not adequately take into consideration.[50]

As part of its mission to promote uniformity and fairness in federal sentencing, Congress also requires the USSC to review and revise the USSG periodical-

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[44] *Id.* §§ 1B1.1(a)(7), 5A, cmt.1. For example, a defendant with an offense level of eight and a criminal history category of IV would receive a guideline sentencing range of ten to sixteen months imprisonment. *See id.* § 5A.

[45] *Id.* § 1B1.1(a)(8). For example, courts may impose a sentence of probation only if the defendant's guideline range is in Zone A of the sentencing table or if the defendant's guideline range is in Zone B of the sentencing table and the court requires a condition or combination of intermittent confinement, community confinement, or home detention and if no statutory restrictions apply. *Id.* § 5B1.1(a)–(b). The USSC outlines the entire sentencing process in eight steps. *See id.* § 1B1.1(a)(1)–(8). All defendants are also subject to a hundred-dollar fine per offense. *Id.* § 5E1.2(a)(3).

[46] 18 U.S.C. § 3553(a)(1)–(7) (2012) (declaring that courts "shall consider" several factors in determining the particular sentence to be imposed in each case, including the nature and circumstances of the offense, the history and characteristics of the defendant, the deterrent effect of the sentence, the need to protect the public, and the need to provide restitution to any victims).

[47] *Id.* § 3553(a)(2)(A)–(D).

[48] *See, e.g.*, United States v. Kippers, 685 F.3d 491, 497 (5th Cir. 2012) (stating that for the court to determine whether a sentence is plainly unreasonable, the court must ensure that the district court committed no significant procedural error, such as "failing to consider the § 3553(a) factors"); Alexandra A.E. Shapiro & Nathan H. Seltzer, *Guidelines or Higher: NYCDL's Study of Reasonableness Review Patterns Reveals the Courts of Appeals' Aversion to Parsimony*, 19 FED. SENT'G REP. 177, 177 (2007) (stating that the USSG were designed to account for certain "Section 3553(a) factors"); Thomas E. Gorman, Comment, *Fast-Track Sentencing Disparity: Rereading Congressional Intent to Resolve the Circuit Split*, 77 U. CHI. L. REV. 479, 494 (2010) (noting how district courts must "carefully weigh the § 3553(a) factors" in crafting an appropriate sentence).

[49] *See* 18 U.S.C. § 3553(b)(1) ("[T]he court *shall* impose a sentence of the kind, and within the range . . . unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." (emphasis added)).

[50] *See id.* (allowing courts to deviate from the guideline range when "there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described"). In determining whether the USSC adequately accounted for the circumstance, courts may only consider the text of the USSG, policy statements, and official commentary from the USSC. *Id.*

ly.[51] The SRA grants the USSC authority to amend the USSG based on their findings, although Congress must approve the amendments and retains veto power.[52] If Congress approves an amendment, the USSC decides whether it applies retroactively to defendants sentenced before the amendment.[53] Eligible defendants may seek resentencing in these situations.[54]

2. The Effect of Statutory Mandatory Minimums and Departures for a Defendant's Substantial Assistance to Authorities

Although the USSG have been in place since 1987, their precise role has evolved since Congress made the USSG binding and compulsory on federal courts through the SRA.[55] In 2005, the U.S. Supreme Court, in *United States v. Booker*, found statutes making the USSG binding on federal courts unconstitutional.[56] In doing so, the court reinterpreted the USSG as being merely advisory.[57] Furthermore, in 2007, in *Gall v. United States*, the Supreme Court clarified that judges need not find "extraordinary circumstances" to depart from the USSG and refused to sanction a presumption of unreasonableness for all sen-

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[51] 28 U.S.C. § 994(o) (2012) (stating that the Commission "shall review and revise, in consideration of comments and data coming to its attention" the USSG).

[52] *Id.* § 994(o)–(p) ("The Commission . . . may promulgate under subsection (a) of this section and submit to Congress amendments to the guidelines . . . except to the extent that the effective date is revised or the amendment is otherwise modified or disapproved by Act of Congress.").

[53] *See id.* § 994(u) ("If the Commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses, it shall specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced."). In deciding which amendments are retroactive, the USSC considers the purpose of the amendment, the magnitude of the change, and the difficulty of applying the amendment retroactively. U.S. SENTENCING GUIDELINES MANUAL, *supra* note 11, § 1B1.10, cmt. background.

[54] *See* 18 U.S.C. § 3582(c)(2) (2012); U.S. SENTENCING GUIDELINES MANUAL, *supra* note 11, § 1B1.10(a); *see also* Griffin v. United States, No. CIV 05-73343, 2006 WL 2788010, at *1 (E.D. Mich. Sept. 26, 2006) (moving for a sentence reduction based on retroactive Amendments 490 and 591 to the USSG).

[55] *See* 18 U.S.C. § 3553(b)(1) (making the USSG mandatory by stating that courts "shall" impose a USSG sentence unless circumstances exist that were not taken into consideration by the USSC in promulgating the USSG). In 1989, the U.S. Supreme Court reiterated the mandatory nature of the USSG. *See* Mistretta v. United States, 488 U.S. 361, 367 (1989) (noting that Congress explicitly adopted a mandatory system rather than merely advisory one). In 2005, however, the Supreme Court reinterpreted the USSG as being merely advisory. *See* United States v. Booker, 543 U.S. 220, 245 (2005) (declaring § 3553(b)(1) of the SRA unconstitutional); *see also* Rosemary T. Cakmis, *The Role of the Federal Sentencing Guidelines in the Wake of* United States v. Booker *and* United States v. Fanfan, 56 MERCER L. REV. 1131, 1133–41 (2005) (discussing the evolution of the role of the USSG in federal sentencing).

[56] *See* 543 U.S. at 245. The court found the section of the SRA making the USSG mandatory incompatible with the Sixth Amendment's requirement that any fact, other than a prior conviction, which increases a defendant's sentence must be either admitted by the defendant or proven beyond a reasonable doubt. *See id.*

[57] *See id.* (holding that the SRA made the USSG effectively advisory; although courts must consider the guideline ranges, they may tailor a sentence in light of other statutory concerns, such as those expressed in § 3553(a)).

tences with departures.[58] Nonetheless, the Court declared that judges must still begin all sentencing proceedings by correctly calculating a defendant's range under the USSG.[59]

Courts applying the USSG also must adhere to mandatory minimum sentences imposed by statute.[60] Under the USSG, if the mandatory minimum is *greater* than the *ceiling* of the calculated guidelines range, the mandatory minimum becomes the "guideline sentence."[61] A mandatory minimum can therefore have either a marginal or drastic effect on a defendant's sentence depending on whether it falls above, below, or in between a defendant's calculated guideline range.[62] If the mandatory minimum falls *below* the range, the court can simply impose a sentence within the range.[63] If the mandatory minimum lies *within* the range, the court cannot go below it, but has discretion to impose a harsher sentence, if warranted, within the upper bounds of the range.[64] If the mandatory minimum lies *above* the range, as occurs in the most controversial cases, courts have no choice but to impose the mandatory minimum sentence, even though it may lie well above the carefully calculated range under the USSG.[65]

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[58] *See* 552 U.S. 38, 47 (2007).

[59] *See id.* at 49. Failing to do so, the Court explained, constitutes reversible error. *See id.* at 51; Daniel I. Siegfried, Comment, *"Based on" the Guidelines? Applying Retroactive Sentencing Amendments to Binding Plea Agreements*, 77 U. CHI. L. REV. 1801, 1805 (2010) (noting that the Court in *Gall* ensured that all sentencing proceedings "unfold in the shadow of the Guidelines").

[60] *See* U.S. SENTENCING GUIDELINES MANUAL, *supra* note 11, § 1B1.1(a)(8) ("[D]etermine from Parts B through G of Chapter Five the sentencing requirements . . . ."); *id.* § 5G1.1(b) ("Where a statutorily required minimum sentence is greater than the maximum of the applicable guideline range, the statutorily required minimum sentence shall be the guideline sentence."). Courts consider mandatory minimums after calculating a defendant's guideline range. *See id.* § 1B1.1(a)(8).

[61] *Id.* § 5G1.1(a).

[62] *See* United States v. Cordero, 313 F.3d 161, 166 (3d Cir. 2002) (noting that mandatory minimums "subsumes and displaces" the guideline range); U.S. SENTENCING GUIDELINES MANUAL, *supra* note 11, § 5G1.1(a)–(b) (providing that when the low end of a guideline range is higher than the maximum sentence, the statutory maximum sentence becomes the guideline sentence, and when the guideline range is lower than the minimum sentence, the statutory minimum becomes the sentence); *see also infra* notes 135–139, 145–149, 161–166 and accompanying text (describing three cases in which the mandatory minimum sentence imposed by statute exceeded the defendant's guideline range, causing a significant increase in the defendant's sentence).

[63] *See* U.S. SENTENCING GUIDELINES MANUAL, *supra* note 11, § 5G1.1(c).

[64] *See id.*

[65] *See id.* § 5G1.1(b). Much debate surrounds the wisdom of mandatory minimum sentences that curtail judicial discretion in this way. *See, e.g.*, Gary T. Lowenthal, *Mandatory Sentencing Laws: Undermining the Effectiveness of Determinate Sentencing Reform*, 81 CALIF. L. REV. 61, 65–66 (1993) (arguing that Congress should decrease the severity of mandatory minimums and authorize trial courts to depart from them when substantial and compelling mitigating circumstances exist); Norman L. Reimer & Lisa M. Wayne, *From the Practitioners' Perch: How Mandatory Minimum Sentences and the Prosecution's Unfettered Control over Sentence Reductions for Cooperation Subvert Justice and Exacerbate Racial Disparity*, 160 U. PA. L. REV. PENNUMBRA 159, 160 (2011), http://www.pennlawreview.com/online/160-U-Pa-L-Rev-PENNumbra-159.pdf, *archived at* http://perma.cc/Z3Q6-R7J5 (arguing that mandatory minimums rarely correlate with criminality, convert low-level offenders into career criminals, and undermine public confidence in the criminal justice system, espe-

Courts may, however, depart from a mandatory minimum as well as the defendant's guideline range in certain situations, such as when a defendant provides substantial assistance to authorities in the investigation or prosecution of another person who has committed a crime.[66] Defendants who provide substantial assistance to authorities may receive a sentence below both the mandatory minimum *and* the low end of the calculated guideline range.[67] Although courts need not impose the mandatory minimum in these situations, the defendant's sentence must still follow the USSG.[68] Similarly, the USSG also allows downward departures from a defendant's sentencing range for his or her substantial assistance to authorities.[69]

B. Changing Sentencing Schemes for Crack Cocaine Offenses from 1970 to 2010

Federal sentencing for crack cocaine offenses has followed Congress's changing attitude towards the drug since its prevalence in the 1970s.[70] Cocaine, a powerful stimulant derived from the leaves of coca plants, appeared towards

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cially in poor and disadvantaged communities);Whitley Zachary, Comment, *Prison, Money, and Drugs: The Federal Sentencing System Must Be More Critical in Balancing Priorities Before It Is Too Late*, 2 TEX. A&M L. REV. 323, 349–52 (2014) (arguing that mandatory minimums spurred by the "war on drugs" exacerbate a culture of incarceration and that the USSC should comprehensively reform the sentencing system free from the constraints of mandatory minimums to ensure that sentences emphasize treatment as well as punishment).

[66] *See* 18 U.S.C. § 3553(e) (2012); U.S. SENTENCING GUIDELINES MANUAL, *supra* note 11, § 5K1.1.

[67] *See* 18 U.S.C. § 3553(e) ("Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense."); U.S. SENTENCING GUIDELINES MANUAL, *supra* note 11, § 5K1.1. ("Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines."). *See generally* Pepper v. United States, 562 U.S. 476 (2011) (explaining that a district court may consider evidence of a defendant's rehabilitation when considering a motion for resentencing and that such evidence may, in appropriate cases, support a downward variance from the guideline range).

[68] *See* 18 U.S.C. § 3553(e) ("Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission . . . .").

[69] U.S. SENTENCING GUIDELINES MANUAL, *supra* note 11, § 5K1.1. The USSG instruct courts to take certain factors into account in determining whether to impose a sentence below a defendant's guideline range. *Id.* § 5K1.1(a). Courts weigh the significance and usefulness of the defendant's assistance; the truthfulness, completeness, and reliability of the assistance; and any danger of injury to the defendant or his or her family. *Id.* § 5K1.1(a)(1)–(2), (4). This downward departure only occurs by a motion from the government, however, and the court may or may not grant the motion at its own discretion based on the details of the defendant's assistance. *See* 18 U.S.C. § 3553(e); U.S. SENTENCING GUIDELINES MANUAL, *supra* note 11, § 5K1.1.

[70] *See* Sarah Hyser, Comment, *Two Steps Forward, One Step Back: How Federal Courts Took the "Fair" Out of the Fair Sentencing Act of 2010*, 117 PENN ST. L. REV. 503, 508–12 (2012).

the end of the nineteenth century.[71] The drug originally took the form of a fine white powder, which experts widely considered dangerous and incredibly addictive.[72] In the 1970s, cocaine users began applying a chemical process to powder cocaine that crystallized the purified cocaine base.[73] This purified form, known as crack cocaine, produces a more immediate, more intense high than powder cocaine.[74] As a result, crack cocaine users could become addicted in a matter of weeks rather than years.[75] Because crack cocaine was so easy and inexpensive to produce, the drug became readily accessible and affordable to the masses.[76] Newspapers widely referred to crack cocaine use as an "epidemic" throughout the 1980s as the drug spread and the number of robberies, prostitution, and other crimes increased.[77]

The Controlled Substances Act ("CSA"), passed in 1970, originally made no mention of cocaine-related offenses.[78] In 1986, however, Congress passed the Anti-Drug Abuse Act of 1986 ("ADAA"), which added cocaine to the CSA as a

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[71] *See Powdered Cocaine Fast Facts*, U.S. DEP'T OF JUSTICE, http://www.justice.gov/archive/ndic/pubs3/3951/index.htm, *archived at* http://perma.cc/KCY5-98EB (2003).

[72] *See* Michael McNeill, Comment, *Crack, Congress, and the Normalization of Federal Sentencing: Why 12,040 Federal Inmates Believe That Their Sentences Should Be Reduced, and Why They and Others Like Them May Be Right*, 63 MERCER L. REV. 1359, 1362 (2012). Cocaine is classified as a Schedule II drug under the CSA, which means it "has a high potential for abuse . . . [and] may lead to severe psychological or physical dependence." Controlled Substances Act, 21 U.S.C. § 812(b)(2)(B)–(C) (2012); *see* U.S. DEP'T OF JUSTICE, *supra* note 71.

[73] *See* McNeill, *supra* note 72, at 1362–63.

[74] *See id.* (noting that crack cocaine has a more immediate, more intense effect on users than powdered cocaine, though its effects fade more quickly); U.S. DEP'T OF JUSTICE, *supra* note 71 (stating that crack cocaine produces an immediate high).

[75] *See* McNeill, *supra* note 72, at 1364.

[76] *See* U.S. DEP'T OF JUSTICE, *supra* note 71.

[77] *See*, *e.g.*, Richard M. Smith, *The Plague Among Us*, NEWSWEEK, June 16, 1986, at 15, 16 (likening the increasing use of crack cocaine to the plagues of medieval times); Ellen Mitchell, *Crack Addiction Is Forcing Prostitutes onto the Streets*, N.Y. TIMES, Feb. 18, 1990, http://www.nytimes.com/1990/02/18/nyregion/crack-addiction-is-forcing-prostitutes-onto-the-streets.html, *archived at* http://perma.cc/R9DC-E3GG (reporting that prostitution arrests dramatically increased between 1988 and 1989 and that many arrestees were addicted to crack cocaine and working to fuel their addiction); Tom Quinn, *Rising "Crack" Epidemic: Colombia Now Stung by Curse of Cocaine*, L.A. TIMES, Sept. 20, 1987, http://articles.latimes.com/1987-09-20/news/mn-8919_1_epidemic-proportions, *archived at* http://perma.cc/4EXR-FSRM (characterizing the crack cocaine problem in Los Angeles as an "epidemic"). Much of the hype surrounding the rise in crack cocaine use was later criticized, however, as overstating the extent of the problem. *See* Donna M. Hartman & Andrew Golub, *The Social Construction of the Crack Epidemic in the News Media*, 31 J. PSYCHOACTIVE DRUGS, Oct.–Dec. 1999, at 423, 423–33 (1999) (noting that early news coverage about the proliferation and effects of crack cocaine led to a great panic, much of which was later debunked by scholarly research).

[78] Controlled Substances Act, Pub. L. No. 91-513, § 202, 84 Stat. 1242, 1250 (1970) (codified as amended at 21 U.S.C. § 812 (2012)); *see* Elizabeth Rodd, Note, *Light, Smoke, and Fire: How State Law Can Provide Medical Marijuana Users Protection from Workplace Discrimination*, 55 B.C. L. REV. 1759, 1764 (2014) (noting marijuana's listing in the original CSA in 1970).

controlled substance.[79] The ADAA created a harsh disparity in sentencing between crack and powder cocaine offenses due to the perceived heightened danger of crack cocaine.[80] An offender caught with five hundred grams of powder cocaine would receive the same sentencing range—five to forty years in prison—as an offender caught with only five grams of crack cocaine, even for a first-time offense.[81] This infamous disparity became known as the 100:1 ratio between crack and powder cocaine offenses; an offender could be caught with one hundred times more powder cocaine than crack cocaine and still receive the same sentencing range.[82]

Additionally, the ADAA amended the CSA to provide mandatory minimum sentences for crack cocaine offenses.[83] Under the amended CSA, offenses involving more than five grams of crack cocaine carried a mandatory minimum of five years imprisonment, and those involving more than fifty grams carried a mandatory minimum of ten years.[84] If the defendant had a prior felony drug offense, the mandatory minimum sentence doubled.[85]

When Congress passed the ADAA in 1986, the SRA had been enacted but the USSC had not yet fully promulgated the USSG.[86] As such, when the USSC first promulgated the USSG in 1987, the USSC adopted the 100:1 crack-powder cocaine disparity prescribed by the ADAA.[87] Because the USSG were compul-

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[79] *See* Anti-Drug Abuse Act of 1986, Pub. L. No. 99–570, § 1002, 100 Stat. 3207, 3207 (codified as amended at 21 U.S.C. § 841).

[80] *See id.*; Maxwell Arlie Halpern Kosman, Note, *Falling Through the Crack: How Courts Have Struggled to Apply the Crack Amendment to "Nominal Career" and "Plea Bargain" Defendants*, 109 MICH. L. REV. 785, 796 (2011) (noting that the ADAA ostensibly aimed to reflect society's strong view of the evils of crack cocaine).

[81] *See* Controlled Substances Act, 21 U.S.C. § 841(b)(1)(B).

[82] *See id.*; Kosman, *supra* note 80, at 796.

[83] *See* § 841(b)(1)(B).

[84] 21 U.S.C. § 841(b)(1)(A)(iii), (viii), (B)(iii), (viii) (2012).

[85] *Id.* § 841(b)(1)(A)(viii), (B)(viii). If a defendant subject to the five-year mandatory minimum had a prior felony drug offense, the mandatory minimum sentence increases to ten-years imprisonment. *Id.* § 841(b)(1)(A)(viii). Similarly, if a defendant subject to the ten-year mandatory minimum had a prior felony drug offense, the mandatory minimum sentence increases to twenty-years imprisonment. *Id.* § 841(b)(1)(B)(viii).

[86] *See* Sentencing Reform Act of 1984, Pub. L. 98-473, § 991, 98 Stat. 1987, 2017 (codified as amended at 18 U.S.C. §§ 3551–3742 (2012); 28 U.S.C. §§ 991–998 (2012)); Anti-Drug Abuse Act of 1986, Pub. L. No. 99–570, § 1002, 100 Stat. 3207, 3207 (codified as amended at 21 U.S.C. § 841). The USSC submitted its initial set of USSG to Congress in 1987, a year after the passage of the ADAA. *See* Anti-Drug Abuse Act of 1986, § 1002; U.S. SENTENCING GUIDELINES MANUAL, *supra* note 11, § 1A1.1.

[87] *See* U.S. SENTENCING GUIDELINES MANUAL, *supra* note 11, § 2D1.1, cmt. background (concluding that "a logical sentencing structure for drug offenses" requires coordination with mandatory minimums); Recent Cases, *Criminal Law—Federal Sentencing Guidelines—Eighth Circuit Holds That District Court Cannot Reduce Sentence Based on Categorical Disagreement with 100:1 Powder/Crack Cocaine Quantity Ratio*—United States v. Spears, 120 HARV. L. REV. 2004, 2007 (2007) (noting that the USSC, not Congress, chose to apply the 100:1 ratio in calculating every federal cocaine offender's guideline sentence).

sory on federal courts at that time, so were the heightened sentencing ranges and mandatory minimum sentences for crack cocaine offenses.[88] Even after the Supreme Court declared the USSG advisory in 2005, the SRA still required courts to impose sentences within guideline ranges for crack cocaine offenses.[89]

Despite the heightened danger of crack cocaine, critics vehemently denounced the 100:1 ratio for its unjustified harshness and disparate impact on African-Americans.[90] In 1995, once the hype of the crack cocaine "epidemic" wore off, the USSC proposed amendments to reduce the 100:1 ratio to a 1:1 ratio, but Congress rejected them using its veto power.[91] In response, the USSC issued several reports in the next few years urging Congress to reduce or eliminate the crack-powder cocaine disparity.[92] After nearly a decade of inaction, the USSC proposed another amendment in 2007, Amendment 706, to reduce the base offense levels for most crack cocaine offenses by two levels.[93] This time, Congress

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[88] *See* 18 U.S.C. § 3553(b)(1) ("[T]he court shall impose a sentence of the kind, and within the [guideline] range . . . unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.").

[89] *See id.* Congress did not strike or amend the language of § 3553(b)(1) after the U.S. Supreme Court declared it unconstitutional. *See id.*; *Booker*, 543 U.S. at 245. The Supreme Court has clarified that courts must begin all sentencing proceedings by calculating the defendant's guideline sentence. *See Gall*, 552 U.S. at 49.

[90] *See, e.g.*, William Spade, Jr., *Beyond the 100:1 Ratio: Towards a Rational Cocaine Sentencing Policy*, 38 ARIZ. L. REV. 1233, 1238 (1996) (arguing that Congress and the USSC should adopt a 1:1 ratio for low-level offenders and a 20:1 ratio for mid- and high-level dealers); Alyssa L. Beaver, Note, *Getting a Fix on Cocaine Sentencing Policy: Reforming the Sentencing Scheme of the Anti-Drug Abuse Act of 1986*, 78 FORDHAM L. REV. 2531, 2549 (2010) (arguing that the 100:1 crack-powder cocaine disparity adversely affects African Americans).

[91] *See* Act of Oct. 30, 1995, Pub. L. 104-38, § 1, 109 Stat. 334, 334 (rejecting the proposed amendments); Amendments to the Sentencing Guidelines for United States Courts, 60 Fed. Reg. 25074-01 (May 10, 1995) (providing notice of the submission of amendments to the USSG to Congress). In rejecting the USSC's proposal, Congress stated that any changes to the USSG for crack and powder cocaine offenses should reflect *greater* punishment for trafficking in crack cocaine, rather than *less* punishment for trafficking in the same amount of powder cocaine. Steven L. Chanenson, Booker *on Crack: Sentencing's Latest Gordian Knot*, 15 CORNELL J.L. & PUB. POL'Y 551, 563 (2006).

[92] *Compare* U.S. SENTENCING COMM'N, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 107 (2002), *available at* http://www.ussc.gov/news/congressional-testimony-and-reports/drug-topics/report-congress-cocaine-and-federal-sentencing-policy, *archived at* http://perma.cc/PX47-U64Q (recommending a 20:1 ratio), *with* U.S. SENTENCING COMM'N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 9 (1997), *available at* http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Drug_Topics/19970429_RtC_Cocaine_Sentencing_Policy.pdf, *archived at* http://perma.cc/NW8N-NWL8 (recommending a 5:1 ratio).

[93] *See* U.S. SENTENCING GUIDELINES MANUAL, *supra* note 11, app. C, § 706. Each base offense level contains a range of drug quantities involved in the offense. *See id.* § 2D1.1(c). The base offense levels range from six to thirty-eight, increasing by twos. *Id.* § 2D1.1(c)(1)–(17). Amendment 706 moved each range down one level, such as thirty-eight to thirty-six, thirty-six to thirty-four, and so on. *Id.* app. C, § 706. For example, an offense involving between 150 and 500 grams of crack cocaine was

did not exercise its veto power and the amendment passed.[94] The USSC then made Amendment 706 retroactive, which triggered a wave of resentencing motions.[95]

In the wake of this amendment by the USSC, Congress took action with the FSA, which reduced the crack-powder cocaine disparity from 100:1 to 18:1.[96] To restore fairness to federal cocaine sentencing, the FSA increased the quantities of crack cocaine necessary to trigger the CSA's five and ten year mandatory minimums.[97] In addition, the FSA directed the USSC to promulgate amendments to the USSG lowering the guideline ranges for crack cocaine offenses to conform to the statutory changes.[98] The USSC complied with this instruction by issuing Amendment 748 in November 2010, which reduced guideline ranges for crack cocaine offenses by the same 18:1 ratio endorsed by the FSA.[99] The USSC made this amendment permanent and retroactive a year later.[100]

C. Sentence Reductions in Light of Subsequently Lowered Guideline Ranges for Crack Cocaine Offenses Under the FSA

In light of Amendment 748, crack cocaine offenders sentenced before the FSA may seek a sentence reduction, but remain subject to the mandatory minimum in effect at their original sentencing.[101] This is because the CSA's previous

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previously assigned a base offense level of thirty-four. *Id.* After Amendment 706, such an offense was assigned a base offense level of thirty-two. *Id.*

[94] *See id.*

[95] *See* 18 U.S.C. § 3582(c)(2) (2012) ("In the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission . . . the court may reduce the term of imprisonment . . . ."); U.S. SENTENCING GUIDELINES MANUAL, *supra* note 11, app. C, § 713 (stating that the USSC has determined that Amendment 706 should be applied retroactively because the standards in the USSG § 1B1.10 appear to be met, because the amendment alleviates urgent and compelling problems associated with the penalty structure for crack cocaine offenses, the number of cases potentially involved is substantial, the magnitude of the change is not difficult to apply in individual cases, and the administrative burden is manageable); Kreiner, *supra* note 9, at 870 (noting how retroactive reductions to the guideline ranges for crack cocaine offenses have spurred tens of thousands of motions for resentencing).

[96] *See* Fair Sentencing Act of 2010, Pub. L. 111-220, § 2(a), 124 Stat. 2372, 2372 (codified at 21 U.S.C. § 841 (2012)).

[97] *See id.* The FSA increased the quantity necessary to trigger the five-year mandatory minimum from five to twenty-eight grams and increased the quantity necessary to trigger the ten-year mandatory minimum from 50 to 280 grams. *Id.*

[98] *See id.* § 8.

[99] *See* U.S. SENTENCING GUIDELINES MANUAL, *supra* note 11, app. C, § 748.

[100] *See id.* app. C, §§ 750, 759 (making the emergency changes in Amendment 748 permanent and retroactive).

[101] *See* 18 U.S.C. § 3582(c)(2) (2012); Fair Sentencing Act of 2010, § 2(a); U.S. SENTENCING GUIDELINES MANUAL, *supra* note 11, app. C, §§ 748, 750; Dorsey v. United States, 132 S. Ct. 2321, 2336 (2012) (holding that the FSA's heightened quantities necessary to trigger the five and ten-year mandatory minimums are not retroactive). If the USSC lowers a guideline range and deems the amendment retroactive, as it did with Amendment 748, eligible prisoners may move for resentencing. *See* 18 U.S.C. § 3582(c)(2); U.S. SENTENCING GUIDELINES MANUAL, *supra* note 11, app. C. §§ 748,

mandatory minimums still apply.[102] The U.S. Supreme Court ruled in 2012 in *United States v. Dorsey* that the FSA's increase in the quantities necessary to trigger the mandatory minimums for crack cocaine offenses are not retroactive.[103] Therefore, defendants sentenced before the FSA who received a mandatory minimum sentence are subject to the same mandatory minimum even if the mandatory minimum would not otherwise apply since the FSA's enactment.[104] Defendants who provided substantial assistance to authorities, however, may be eligible for a sentence reduction because they avoided the mandatory minimum sentence, although their eligibility currently depends on their jurisdiction's interpretation of the sentence reduction requirements.[105]

The resentencing statute imposes two eligibility requirements before a court may consider reducing a defendant's sentence.[106] First, the defendant's sentence must have been "based on" a guideline range that was subsequently lowered by the USSC through a retroactive amendment.[107] Second, the amendment must have the effect of lowering the defendant's "applicable guideline range" at their original sentencing.[108] The policy statement accompanying this requirement

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750. Tens of thousands of federal prisoners already have filed resentencing motions in light of Amendment 748 and the lower guideline ranges for crack cocaine offenses. *See* Kreiner, *supra* note 9, at 870.

[102] *See Dorsey*, 132 S. Ct. at 2336.

[103] *See id.*

[104] *See id.* Joiner, for example, would have been subject to a lower mandatory minimum had he been sentenced after the FSA. *See* Fair Sentencing Act of 2010, § 2(a); *Joiner*, 727 F.3d at 602. His offense involved 129.77 grams of cocaine, more than the fifty grams necessary to trigger the ten-year mandatory minimum before the FSA. *See* Controlled Substances Act, 21 U.S.C. § 841(b)(1)(A)(iii) (2006); *Joiner*, 727 F.3d at 602. The FSA increased this quantity to 280 grams, which Joiner would not have met. *See* Fair Sentencing Act of 2010, § 2(a); *Joiner*, 727 F.3d at 602. He would, however, have met the twenty-eight grams necessary to trigger the five-year mandatory minimum. *See* Fair Sentencing Act of 2010, § 2(a); *Joiner*, 727 F.3d at 602.

[105] *See* 18 U.S.C. § 3553(e) (stating that defendants sentenced based on a guideline range subsequently lowered by the USSC may seek a sentence reduction); *id.* § 3582(c)(2) (providing that courts have limited authority to impose a sentence below a mandatory minimum to reflect the defendant's substantial assistance to authorities); U.S. SENTENCING GUIDELINES MANUAL, *supra* note 11, § 5K1.1. *Compare Joiner*, 727 F.3d at 609 (finding a defendant ineligible for a sentence reduction because he did not meet the second requirement, i.e., Amendment 750 did not have the effect of lowering his "applicable guideline range"), *and Williams*, 512 F. App'x at 600 (finding a defendant ineligible for a sentence reduction because he did not meet the first requirement, i.e., his sentence was not "based on" a subsequently lowered guideline range), *with In re Sealed Case*, 722 F.3d at 366 (finding a similarly situated defendant eligible for a sentence reduction because he met both requirements).

[106] 18 U.S.C. § 3582(c)(2).

[107] *Id.*

[108] *See id.*; U.S. SENTENCING GUIDELINES MANUAL, *supra* note 11, § 1B1.10. The resentencing statute requires that: (1) the defendant's sentence was based on a sentencing range subsequently lowered by the USSC, and (2) the reduction is consistent with applicable policy statements issued by the USSC. 18 U.S.C. § 3582(c)(2). The applicable policy statement in this case provides that a sentence reduction is *not* consistent with the policy statement if the amendment does not have the effect of lowering the defendant's "applicable guideline range." U.S. SENTENCING GUIDELINES MANUAL, *supra* note 11, § 1B1.10(a)(2)(B). Thus, the two eligibility requirements provided by the statute and

suggests that an amendment may not have the effect of lowering the defendant's "applicable guideline range" due to the operation of another guideline or statutory provision, such as a mandatory minimum.[109]

The policy statement further limits sentence reductions for eligible defendants by preventing the court from reducing the defendant's sentence below the floor of the amended guideline range.[110] In other words, the low-end of the new range constitutes the best-case scenario for the defendant's sentence reduction.[111] If the defendant's original sentence was less than the floor of the original guideline range due to a downward departure for the defendant's substantial assistance to authorities, however, a comparable reduction below the floor of the amended guideline range may be appropriate.[112] This exception ensures that a defendant who received a downward departure for their substantial assistance to authorities receives an equivalent departure if the USSC subsequently lowers the guideline range applied to him or her at original sentencing.[113]

The USSC defined "applicable guideline range" in Amendment 750 in 2011 to address a separate issue that divided the circuits.[114] Some circuit courts had held that sentencing courts might consider some departures—such as departures for substantial assistance to authorities—before calculating a defendant's guideline range, although others held that the guideline range must be calculated before considering any departure.[115] The USSC endorsed the latter approach by

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policy statement are: (1) the defendant's sentence was "based on" a sentencing range subsequently lowered by the USSC, and (2) the amendment has the effect of lowering the defendant's "applicable guideline range." *See* 18 U.S.C. § 3582(c)(2); U.S. SENTENCING GUIDELINES MANUAL, *supra* note 11, § 1B1.10(A)(2)(b). Defendants who meet both eligibility requirements do not, however, automatically receive a sentence reduction. *See* § 18 U.S.C. § 3582(c)(2).

[109] *See* U.S. SENTENCING GUIDELINES MANUAL, *supra* note 11, § 1B1.10, cmt. 1(A) (stating that a sentence reduction is *not* authorized if, *inter alia*, an amendment to the USSG is applicable to the defendant but does not have the effect of lowering the defendant's applicable guideline range because of "the operation of another guideline or statutory provision (e.g., a statutory mandatory minimum term of imprisonment)").

[110] *Id.* § 1B1.10(b)(2)(A) ("[T]he court shall not reduce the defendant's term of imprisonment . . . to a term that is less than the minimum of the amended guideline range . . . .").

[111] *See id.* For example, if a defendant with a criminal history category of II has his or her base offense level reduced from twenty-two to twenty, then his or her guideline range would be reduced from between forty-six and fifty-seven months to between thirty-seven and forty-six months imprisonment. *See id.* § 5A. At resentencing, the court would have discretion to reduce the defendant's sentence to any term of imprisonment between thirty-seven and forty-six months, but could not reduce the sentence to less than the floor of the amended guideline range. *See id.* § 1B1.10(b)(2)(A).

[112] *Id.* § 1B1.10(b)(2)(B) ("If the term of imprisonment imposed was less than the term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing pursuant to a government motion to reflect the defendant's substantial assistance to authorities, a reduction comparably less than the amended guideline range . . . may be appropriate.").

[113] *See id.*

[114] *Id.* app. C, § 759; *see infra* note 115.

[115] *Compare* United States v. Cardosa, 606 F.3d 16, 20 (1st Cir. 2010) (noting that a defendant may be designated as a career offender before calculating his guideline range), *and* United States v. Munn, 595 F.3d 183, 194–95 (4th Cir. 2010) (holding that some departures are considered before

defining "applicable guideline range" as the range that corresponds to the offense level and criminal history category determined pursuant to the USSC's eight steps, which are determined before any departure provision in the USSG or any variance.[116] As such, previously sentenced crack cocaine defendants can now move for a reduced sentence.[117]

II. "CRACKS" IN THE PAVEMENT: DIVERGENT INTERPRETATIONS OF THE ELIGIBILITY REQUIREMENTS FOR SENTENCE REDUCTIONS

A circuit split has recently developed on whether defendants who avoided a mandatory minimum for their substantial assistance to authorities are eligible for sentence reductions due to divergent interpretations of the two eligibility requirements.[118] First, circuit courts disagree on whether a defendant's sentence was "based on" the guideline range subsequently lowered by the U.S. Sentencing Committee ("USSC").[119] Second, the circuit courts disagree about whether a retroactive amendment to the U.S. Sentencing Guidelines ("USSG") has the effect of lowering a defendant's "applicable guideline range" at their original sentencing when the judge departed from the mandatory minimum for a defendant's substantial assistance.[120] This Part analyzes divergent interpretation of the Sixth and D.C. Circuits respectively regarding the two eligibility requirements for sentence reductions when a defendant avoids a mandatory minimum for his or her substantial assistance to authorities.[121] Section A discusses the two interpretations of whether a defendant's sentence was "based on" a guideline range subse-

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calculating the applicable guideline range), *with* United States v. Hameed, 614 F.3d 259, 262 (6th Cir. 2010) (stating that a defendant's guideline range is calculated before consideration of a firearms enhancement and an acceptance of responsibility departure), *and* United States v. Blackmon, 584 F.3d 1115, 1116 (8th Cir. 2009) (holding that the applicable guideline range must be calculated before any departure).

[116] *See* U.S. SENTENCING GUIDELINES MANUAL, *supra* note 11, § 1B1.10, cmt. 1(A) ("Eligibility for consideration under 18 U.S.C. § 3582(c)(2) is triggered only by an amendment . . . that lowers the applicable guideline range (i.e., the guideline range that corresponds to the offense level and criminal history category determined pursuant to § 1B1.1(a), which is determined before consideration of any departure provision in the Guidelines Manual or any variance).").

[117] *See* 18 U.S.C. § 3582(c)(2) (2012).

[118] *Compare* United States v. Joiner, 727 F.3d 601, 609 (6th Cir. 2013) (finding a defendant who avoided a mandatory minimum for his assistance to authorities ineligible for a sentence reduction), *and* United States v. Williams, 512 F. App'x 594, 600 (6th Cir. 2013) (same), *with In re* Sealed Case, 722 F.3d 361, 367–70 (D.C. Cir. 2013) (finding a similarly situated defendant eligible for a sentence reduction).

[119] *Compare Williams*, 512 F. App'x at 600 (holding that a defendant's sentence was not "based on" the guideline range), *with In re Sealed Case*, 722 F.3d at 366 (holding that a similarly situated defendant's sentence *was* "based on" the guideline range).

[120] *Compare Joiner*, 727 F.3d at 609 (holding that Amendment 750 did not have the effect of lowering the defendant's "applicable guideline range"), *with In re Sealed Case*, 722 F.3d at 367–70 (holding that Amendment 750 *did* have the effect of lowering a similarly situated defendant's "applicable guideline range").

[121] *See infra* notes 124–201 and accompanying text.

quently lowered by the USSC.[122] Section B then examines how the two circuits have interpreted whether an amendment to the USSG has the effect of lowering the defendant's "applicable guideline range" at original sentencing.[123]

A. The First Eligibility Requirement: Whether the Defendant's Sentence Was "Based on" the Guideline Range

Eligibility for a sentence reduction depends first on whether the defendant's original sentence was "based on" a guideline range subsequently lowered by the USSC.[124] Although this requirement appears straightforward, the presence of mandatory minimums, substantial assistance departures, and other sentencing factors complicate the analysis.[125] Subsection 1 examines how the U.S. Supreme Court recently confronted the issue and failed to provide guidance to lower courts.[126] Subsection 2 analyzes the approach taken by the Sixth Circuit, which held that sentence reductions are not "based on" the guideline range.[127] Subsection 3 then outlines the contrary view taken by the D.C. Circuit.[128]

1. The Supreme Court's Guidance (or Lack Thereof) in *Freeman v. United States*

In 2011, in *Freeman v. United States*, the U.S. Supreme Court considered whether a sentence was "based on" the guideline range if the sentence was negotiated between the government and the defendant and imposed as a condition of a plea agreement.[129] The four-justice plurality took the broad view that a sentence is "based on" the guideline range if it constitutes a relevant part of the judge's analytical framework in imposing the sentence or approving the agreement.[130] Following this approach, sentences imposed through plea agreements are always "based on" the guideline range, because the USSG require judges to

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[122] *See infra* notes 124–156 and accompanying text.

[123] *See infra* notes 157–201 and accompanying text.

[124] 18 U.S.C. § 3582(c)(2) (2012) ("[I]n the case of a defendant who has been sentenced to a term of imprisonment *based on* a sentencing range that has subsequently been lowered by the Sentencing Commission . . . the court may reduce the term of imprisonment . . . ." (emphasis added)).

[125] *Compare Williams*, 512 F. App'x at 597 (holding that the defendant's sentence was not "based on" the subsequently lowered guideline range because it was based on the mandatory minimum), *with In re Sealed Case*, 722 F.3d at 368 (holding that the defendant's sentence was "based on" the subsequently lowered range because the judge considered the range after "waiv[ing]" the mandatory minimum).

[126] *See infra* notes 129–134 and accompanying text.

[127] *See infra* notes 135–144 and accompanying text.

[128] *See infra* notes 145–156 and accompanying text.

[129] *See* 131 S. Ct. 2685, 2688–89 (2011).

[130] *Id.* at 2692–93 ("[M]odification proceedings should be available to permit the district court to revisit a prior sentence to whatever extent the sentencing range in question was a relevant part of the analytic framework the judge used to determine the sentence or to approve the agreement.").

give due consideration to the range even if the defendant and prosecutor agree on a specific sentence as a guilty plea condition.[131]

Justice Sonia Sotomayor concurred, taking the narrower view that sentences imposed through plea agreements are not "based on" the guideline range, but the agreement itself.[132] Therefore, she contended, a sentence imposed pursuant to a plea agreement is only "based on" the guideline range if the agreement expressly uses the range to establish the sentence as a term of the agreement.[133] Although no majority prevailed, some lower courts use the principles enunciated in *Freeman* to determine whether a sentence is "based on" the guideline range in other contexts.[134]

2. The Sixth Circuit's Approach: A Sentence Is Not "Based on" the Guideline Range When the Defendant Avoided a Mandatory Minimum for His or Her Substantial Assistance to Authorities

In 2013, in *United States v. Williams*, the U.S. Court of Appeals for the Sixth Circuit held that the defendant was ineligible for a sentence reduction because his 135-month sentence was not based on his guideline range.[135] Williams pled guilty to trafficking at least 111.6 grams of crack cocaine in 2004, which corresponded with an offense level of thirty-two.[136] Because Williams had a prior felony drug offense involving more than fifty grams of crack cocaine, however, he was subject to a 240-month mandatory minimum.[137] The judge therefore increased his offense level to thirty-four, the lowest level corresponding to a range containing 240 months, and then made a four-level reduction for accepting responsibility and assisting authorities.[138] His final offense level of thirty after reductions yielded a 135–168 month range, which resulted in a 135-month sentence.[139]

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[131] *See id.*

[132] *Id.* at 2695 (Sotomayor, J., concurring).

[133] *Id.* The dissent agreed with Justice Sotomayor's concurrence that a sentence imposed pursuant to a plea agreement is really "based on" the agreement and not the guideline range, but disagreed with her case-by-case approach for examining whether each agreement takes account of the guideline range, which could lead to arbitrary sentencing disparities. *See id.* at 2700–01 (Roberts, C.J., dissenting). The four justices would have categorically denied sentence reduction eligibility for all sentences agreed upon in a plea bargain. *See id.*

[134] *See Williams*, 512 F. App'x at 597 (adopting Justice Sotomayor's approach in *Freeman* that plea agreements are not generally based on the USSG, but can be when the guideline range is explicitly mentioned in the agreement); *In re Sealed Case*, 722 F.3d at 368 (agreeing with the *Freeman* plurality's approach that sentences agreed upon in plea agreements are still based on the USSG).

[135] *See* 512 F. App'x at 600.

[136] *Id.* at 596. The court later decreased this level by two for his acceptance of responsibility and two for his substantial assistance to authorities. *Id.*

[137] *See id.*

[138] *Id.*

[139] *Id.*

In 2012, after serving approximately eight years of imprisonment, Williams moved for a sentence reduction in accordance with Amendment 750.[140] Although the sentencing judge explicitly used the USSG in his calculations, the Sixth Circuit held that Williams's sentence was not "based on" the USSG, but rather the 240-month mandatory minimum.[141] The Sixth Circuit applied Justice Sotomayor's approach in *Freeman*, asking whether the guideline range served as the foundation for the sentence.[142] Looking to what the sentencing judge actually said and did at the original sentencing, the Sixth Circuit reasoned that Williams's sentence was really "based on" the mandatory minimum because the sentencing judge abandoned the original guideline range for one that accounted for the mandatory minimum.[143] Had Williams not been subject to the statute, however, the Sixth Circuit reasoned that his sentence would be "based on" a subsequently lowered range because the judge would not have replaced it with one corresponding to the mandatory minimum.[144]

3. The D.C. Circuit's Approach: A Sentence Is "Based on" the Guideline Range When the Defendant Avoided a Mandatory Minimum for His or Her Substantial Assistance to Authorities

Also in 2013, in *In re Sealed Case*, the U.S. Court of Appeals for the District of Columbia held that a defendant's sentence *was* "based on" a subsequently lowered guideline range because the mandatory minimum no longer applied as a result of the substantial assistance departure.[145] The defendant pled guilty to crimes involving 50 grams or more of crack cocaine and had a prior felony drug offense, which subjected him to the 240-month mandatory minimum.[146] The sentencing judge first calculated an offense level of 29 based on the amount of crack cocaine involved and a guideline range of 151–188 months considering his criminal history category.[147] The judge then departed from both the mandatory minimum and the defendant's guideline range for his substantial assistance to authorities.[148] The judge stated that he considered both the 240-month mandato-

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[140] *Id.* On January 8, 2004, Williams pled guilty to, *inter alia*, three counts of distributing a substance containing crack cocaine, in violation of 21 U.S.C. § 841(a)(1). *Id.* Williams moved for a sentence reduction in February 2012. *Id.*

[141] *See id.* at 598.

[142] *See id.* at 597–98.

[143] *See id.*

[144] *See id.* The sentencing judge would have used an offense level of thirty-two, which he originally calculated before accounting for the mandatory minimum, in making the four-level reduction. *See id.* at 596. This would have made the guideline range 110–137 months, rather than 135–168. *See* U.S. SENTENCING GUIDELINES MANUAL, *supra* note 11, § 5A.

[145] *See* 722 F.3d at 366–68.

[146] *Id.* at 363.

[147] *Id.*

[148] *Id.* at 363–64.

ry minimum as well as the 151–188 month guideline range in imposing a sentence of 135 months.[149]

The D.C. Circuit held that the defendant's sentence was "based on" a subsequently lowered guideline range because the mandatory minimum no longer applied after the judge granted the substantial assistance departure.[150] The court adopted the plurality's approach in *Freeman*, reasoning that a sentence is "based on" a guideline range if it was a relevant part of the judge's analysis in calculating the sentence.[151] This approach, the D.C. Circuit explained, prevents sentencing disparities the USSG sought to correct.[152] Because the district court explicitly considered the range that would have governed his sentence without the mandatory minimum, the D.C. Circuit held that the range clearly represented a relevant part of the district court's analysis.[153]

The D.C. Circuit also distinguished its 2010 decision in *United States v. Cook*, which held the defendant's sentence was "based on" the mandatory minimum and not the guideline range because the judge actually imposed the mandatory minimum sentence.[154] In that case, the *In re Sealed Case* court explained, the mandatory minimum rendered the guideline range completely irrelevant because the judge had no discretion to impose a sentence below it.[155] When a substantial assistance departure affords the judge discretion, however, the D.C. Circuit held that a defendant's sentence may be "based on" the guideline range.[156]

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[149] *Id.* At sentencing, the judge announced that he would "do somewhat of a reduction, not only from the mandatory minimum, but also a *further reduction* from what he would have gotten without the mandatory minimums." *Id.* at 366 (internal quotation marks omitted).

[150] *See id.* at 366–68.

[151] *See id.* at 365.

[152] *See id.*; *see also* Sentencing Reform Act, 28 U.S.C. § 991(b)(1)(B) (2012) (explaining that one of the purposes of the USSC is to "avoid[] unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct").

[153] *See In re Sealed Case*, 722 F.3d at 366. The judge first calculated the guideline range, then declared that he considered both the guideline range and mandatory minimum in crafting the substantial assistance departure. *Id.* at 363–64. The judge added that because the USSC determined that the previous crack cocaine guideline ranges were "flawed," any sentences relying on them "ought to be reexamined." *Id.* at 366.

[154] *Id.* at 366; United States v. Cook, 594 F.3d 883, 885–88 (D.C. Cir. 2010). The sentencing judge in *Cook* found that the defendant had possessed 111 grams of cocaine base, which resulted in a guideline range of 135 to 168 months imprisonment. *Cook*, 594 F.3d at 885. The judge noted, however, that Congress had "superimposed mandatory minimums on top of the Guidelines[,]" which requires the imposition of the mandatory minimum sentence whenever it exceeds the guideline range. *Id.* Therefore, the judge sentenced the defendant to the 240-month mandatory minimum term of imprisonment. *Id.*

[155] *See In re Sealed Case*, 722 F.3d at 366.

[156] *See id.*

B. The Second Eligibility Requirement: Whether the USSG Amendment Has the Effect of Lowering the Defendant's "Applicable Guideline Range"

The second requirement for a sentence reduction demands that the USSG amendment has the effect of lowering the defendant's "applicable guideline range" at the original sentencing.[157] Circuits disagree as to whether an amendment has this effect when the defendant avoided a mandatory minimum for his or her substantial assistance to authorities, which hinges on the definition of "applicable guideline range."[158] Subsection 1 discusses the interpretation that the mandatory minimum becomes the "applicable guideline range."[159] Subsection 2 then examines the alternative interpretation that the "applicable guideline range" is calculated prior to any mandatory minimum adjustments.[160]

1. The Sixth Circuit's Approach: The Mandatory Minimum Becomes the "Applicable Guideline Range," Which Amendments Do Not Have the Effect of Lowering

In 2013, in *United States v. Joiner*, the U.S. Court of Appeals for the Sixth Circuit held that amendments reducing the sentencing ranges for crack cocaine offenses did not have the effect of lowering the defendant's "applicable guideline range" because the mandatory minimum became the "applicable guideline range."[161] The defendant in that case pled guilty to crimes involving 129.77 grams of crack cocaine, which corresponded to a level-thirty offense at the time and a 151–188 month guideline range after considering his criminal history.[162] At the time of his sentencing, however, offenses involving more than fifty grams of crack cocaine carried a 240-month mandatory minimum if the defendant had a prior felony drug conviction.[163] The judge therefore increased Joiner's offense level to thirty-three, the lowest level that, along with Joiner's criminal history category, corresponded with a guideline range containing 240 months (210–262

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[157] *See* 18 U.S.C. § 3582(c)(2) (2012); U.S. SENTENCING GUIDELINES MANUAL, *supra* note 11, § 1B1.10(A)(2)(b).

[158] *Compare Joiner*, 727 F.3d at 609 (holding that an amendment does not have the effect of lowering the defendant's "applicable guideline range" because the mandatory minimum becomes the "applicable guideline range"), *with In re Sealed Case*, 722 F.3d at 366–68 (holding that an amendment *does* lower the "applicable guideline range" because the mandatory minimum is "waived" and the court can impose a sentence within the range, which was settled before considering any mandatory minimums). The USSC defines "applicable guideline range" as the "range that corresponds to the offense level and criminal history category" calculated before any departures or variances. *See* U.S. SENTENCING GUIDELINES MANUAL, *supra* note 11, app. C, § 759.

[159] *See infra* notes 161–181 and accompanying text.

[160] *See infra* notes 182–201 and accompanying text.

[161] *See* 727 F.3d at 605, 609.

[162] *Id.* at 602; *see* U.S. SENTENCING GUIDELINES MANUAL, *supra* note 11, § 5A.

[163] *See Joiner*, 727 F.3d at 602.

months).[164] The judge reduced this level by three for Joiner's acceptance of responsibility and five for his substantial assistance to authorities, resulting in an offense level of twenty-five and a range between one hundred and 125 months.[165] The judge ultimately sentenced Joiner to 107 months imprisonment.[166]

Three years later, Amendment 750 lowered the sentencing ranges for crack cocaine offenses.[167] After the three and five-level departures for his acceptance of responsibility and substantial assistance to authorities, Joiner's range would have decreased from a range of seventy-seven to ninety-six months to a range of only sixty-three to seventy-eight months.[168] Due to the 240-month mandatory minimum, however, Joiner's offense level would remain thirty and still result in a one hundred to 125 month guideline range.[169]

After the district court denied Joiner's request for a sentence reduction under Amendment 750, the Sixth Circuit upheld the decision, holding that because the 240-month mandatory minimum and the resulting 100 to 125 month guideline range still applied, Amendment 750 did not have the effect of lowering Joiner's "applicable guideline range."[170] The court noted that the USSC's definition of "applicable guideline range" in Amendment 750 indicates it is the range that results from applying the eight application steps in their entirety.[171] Courts take mandatory minimums into account at step eight: if a mandatory minimum exists and exceeds the guideline range, the mandatory minimum "shall be the guideline sentence."[172]

The Sixth Circuit reasoned that the mandatory minimum becomes the "applicable guideline range" when it lies above the calculated guideline range.[173] Pointing to Amendment 750's definition of "applicable guideline range," the court determined that all eight steps must be completed to determine the "applicable guideline range."[174] The policy statement authorizing sentencing reductions also lists mandatory minimums as an example of when an amendment does not have the effect of lowering the defendant's "applicable guideline range."[175]

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[164] *See id.* at 603; U.S. SENTENCING GUIDELINES MANUAL, *supra* note 11, § 5A.

[165] *Joiner*, 727 F.3d at 603.

[166] *Id.*

[167] *See* U.S. SENTENCING GUIDELINES MANUAL, *supra* note 11, app. C, § 750. Had Joiner been sentenced in 2011, his offense level would have been twenty-eight—rather than thirty—before any departures. *See Joiner*, 727 F.3d at 602; U.S. SENTENCING GUIDELINES MANUAL, *supra* note 11, app. C, § 750.

[168] *See Joiner*, 727 F.3d at 602; U.S. SENTENCING GUIDELINES MANUAL, *supra* note 11, § 5A.

[169] *See Joiner*, 727 F.3d at 602; U.S. SENTENCING GUIDELINES MANUAL, *supra* note 11, § 5A.

[170] *See Joiner*, 727 F.3d at 603, 609.

[171] *See id.* at 604–05.

[172] *See* U.S. SENTENCING GUIDELINES MANUAL, *supra* note 11, §§ 1B1.1(a)(8), 5G1.1.

[173] *See Joiner*, 727 F.3d at 605.

[174] *See id.*

[175] U.S. SENTENCING GUIDELINES MANUAL, *supra* note 11, § 1B1.10, cmt. 1(A). The policy statement specifically forbids a sentence reduction when "the amendment does not have the effect of

Moreover, the USSC's definition of "applicable guideline range" states that it must be determined before any departure provision or variance in the USSG.[176] As such, the Sixth Circuit reasoned that the mandatory minimum represents a defendant's "applicable guideline range" and amendments to the range do not have the effect of lowering it.[177]

The court rejected Joiner's contention that a defendant who avoided a mandatory minimum for his substantial assistance to authorities may nonetheless be eligible for a sentence reduction.[178] The policy statement provides that a defendant who received a substantial assistance departure from his or her "applicable guideline range" may receive a comparable reduction below the amended range.[179] Joiner argued that defining the "applicable guideline range" as the mandatory minimum renders this provision superfluous.[180] The court disagreed, however, stating that a defendant not subject to a mandatory minimum or whose range falls above the mandatory minimum could still receive a substantial assistance departure below the amended range.[181]

2. The D.C. Circuit's Approach: The "Applicable Guideline Range" Is the Range Calculated Before Adherence to Any Mandatory Minimum

On the other hand, also in 2013, the D.C. Circuit allowed a sentence reduction for a similarly situated defendant in *In re Sealed Case*.[182] Amendment 750 lowered the defendant's offense level from twenty-nine to twenty-three, which would have decreased his guideline range from 151–188 months to a new range of 92–115 months.[183] The defendant therefore requested that his sentence be reduced from 135 months to 92 months, the low end of his amended guideline range.[184] The district judge denied the motion, stating that a defendant is barred

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lowering the defendant's applicable guideline range because of the operation of another guideline or statutory provision (e.g., a statutory mandatory minimum term of imprisonment)." *Id.*

[176] *Id.* (defining "applicable guideline range" as "the guideline range that corresponds to the offense level and criminal history category determined pursuant to § 1B1.1(a), which is determined before consideration of any departure provision in the Guidelines Manual or any variance").

[177] *See Joiner*, 727 F.3d at 604–05.

[178] *See id.* at 606–09.

[179] U.S. SENTENCING GUIDELINES MANUAL, *supra* note 11, § 1B1.10(b)(2)(B). ("If the term of imprisonment imposed was less than [that] . . . provided by the guideline range applicable to the defendant at the time of sentencing pursuant to a government motion to reflect the defendant's substantial assistance to authorities, a reduction comparably less than the amended guideline range determined . . . may be appropriate.").

[180] *See Joiner*, 727 F.3d at 606.

[181] *See id.* at 607.

[182] *See* 722 F.3d at 370.

[183] *See id.* at 363–64.

[184] *Id.* at 364.

from taking advantage of a subsequently amended guideline range because it did not lower his "applicable guideline range" at original sentencing.[185]

The D.C. Circuit reversed, holding that because the defendant did not actually receive the mandatory minimum sentence, the amendment lowered his "applicable guideline range," which the mandatory minimum did not replace.[186] The court noted that the USSC only allows courts to reduce sentences where the amended guideline range would have made a difference in the original sentencing.[187] In *In re Sealed Case*, however, the substantial assistance departure "waived" the mandatory minimum and allowed the court to impose a sentence within the "applicable guideline range."[188] Without the mandatory minimum, nothing kept Amendment 750 from lowering the defendant's "applicable guideline range," making him eligible for a sentence reduction.[189]

The court rejected the notion that the mandatory minimum becomes the "applicable guideline range" because it conflicts with the plain language of the USSG.[190] Instead, the court defined "applicable guideline range" as the range calculated using the defendant's offense level and criminal history category before adhering to the mandatory minimum.[191] This is because USSC defines "applicable guideline range" as the range that corresponds to the defendant's offense level and criminal history category.[192] Moreover, the mandatory minimum does not assign the defendant a new offense level or criminal history category; it is a statute wholly unaffected by those variables.[193] The court added that the mandatory minimum need not *become* the "applicable guideline range," defining it in-

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[185] *Id.*

[186] *See id.* at 367–70. The court reasoned: "In other words, where the mandatory minimum calls for a sentence longer than anything in the guideline range, the statute replaces the guideline range and becomes the guideline sentence. With the guideline range supplanted, the defendant cannot receive the benefit of an amendment that lowers that range." *Id.* at 367.

[187] *Id.* at 367–68. If the mandatory minimum still trumps the amended guideline range, the amendment lowering the range would have had no effect. *See id.*

[188] *Id.* at 368. The court calculates the "applicable guideline range" at step seven. U.S. SENTENCING GUIDELINES MANUAL, *supra* note 11, § 1B1.10(a)(7). The mandatory minimum does not come into play until step eight. *Id.* § 1B1.10(a)(8).

[189] *In re Sealed Case*, 722 F.3d at 368.

[190] *Id.* at 369.

[191] *See id.*

[192] *See* U.S. SENTENCING GUIDELINES MANUAL, *supra* note 11, § 1B1.10, cmt. 1(A). The offense level and criminal history category language mirrors the language at step seven. *See id.* ("[T]he applicable guideline range (i.e., the guideline range that corresponds to the *offense level and criminal history category* . . . .)" (emphasis added)); *id.* § 1B1.1(a)(7) ("Determine the guideline range . . . that corresponds to the *offense level and criminal history category* . . . ." (emphasis added)). Courts calculate the defendant's guideline range using these two variables before considering any mandatory minimums. *Id.* § 1B1.1(a)(7)–(8).

[193] *See In re Sealed Case*, 722 F.3d at 369 ("The appellant's twenty-year mandatory minimum cannot 'correspond to' his offense level and criminal history category under the Guidelines because it is a creature of statute, unaffected by those variables."); U.S. SENTENCING GUIDELINES MANUAL, *supra* note 11, § 1B1.1(a)(8).

stead as the range calculated using the defendant's offense level and criminal history category at step seven.[194] Therefore, although the mandatory minimum may trump the "applicable guideline range" in some cases, it never becomes it.[195]

The court also pointed to important language distinctions between §§ 5G1.1 and 1B1.10 of the USSG.[196] The policy statement in § 1B1.10 states that an amendment must have the effect of lowering a defendant's "applicable guideline range" to receive a sentence reduction.[197] Under § 5G1.1, when a mandatory minimum exceeds the guideline range, the USSC specifically states that it becomes the "guideline sentence," *not* the "applicable guideline range."[198] If the USSC intended for a mandatory minimum to become the "applicable guideline range" when it exceeded it, the D.C. Circuit reasoned that the same language would appear in § 5G1.1, rather than the phrase "guideline sentence."[199] The court found this language difference as evidence that the USSC contemplated that defendants who received substantial assistance departures below their mandatory minimums may still receive a sentence reduction.[200] In contrast to the Sixth Circuit, the D.C. Circuit held that a categorical bar against such defendants would render this exception superfluous.[201]

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[194] *See In re Sealed Case*, 722 F.3d at 369; U.S. SENTENCING GUIDELINES MANUAL, *supra* note 11, § 1B1.1(a)(7). The USSG also repeatedly uses "applicable guideline range" to refer to the range resulting from applying steps one through seven, determined by using the defendant's offense level and criminal history category. *See* U.S. SENTENCING GUIDELINES MANUAL, *supra* note 11, § 5B1.1 (authorizing a probation sentence when the "applicable guideline range" determined by the sentencing table requires a minimum term of zero months of imprisonment); *id.* § 5C1.1(b) (stating that a term of imprisonment may not be required if the low-end of the defendant's "applicable guideline range" determined by the sentencing table is zero).

[195] *See In re Sealed Case*, 722 F.3d at 369–70.

[196] *See id.*

[197] *See* U.S. SENTENCING GUIDELINES MANUAL, *supra* note 11, § 1B1.10(a)(2)(B).

[198] *See id.* § 5G1.1(b) ("Where a statutorily required minimum sentence is greater than the maximum of the *applicable guideline range*, the statutorily required minimum sentence shall be the *guideline sentence.*" (emphasis added)).

[199] *See In re Sealed Case*, 722 F.3d at 369.

[200] *Id.*, 722 F.3d at 370.

[201] *See id.* Unlike the Sixth Circuit, the D.C. Circuit read § 1B1.10(b) to confirm sentence reduction eligibility for defendants who received substantial assistance departures below mandatory minimums. *Compare Joiner*, 727 F.3d at 606–07 (finding that § 1B1.10(b) does not support eligibility for defendants who avoided a mandatory minimum for their substantial assistance to authorities because defendants whose guideline ranges fell above the mandatory minimum as well as defendants not subject to a mandatory minimum may still receive reductions), *with In re Sealed Case*, 722 F.3d at 370 (finding that § 1B1.10(B) shows the USSC clearly anticipated that defendants who avoided a mandatory minimum for their substantial assistance to authorities would be eligible for further sentence reductions).

III. SEMANTICS & COMMON SENSE: THE TEXT AND POLICY OF THE USSG SUPPORT SENTENCE REDUCTIONS FOR CRACK COCAINE OFFENDERS WHO AVOIDED A MANDATORY MINIMUM FOR THEIR SUBSTANTIAL ASSISTANCE TO AUTHORITIES

The D.C. Circuit's interpretation of the eligibility requirements for sentence reductions best comport with the text of the U.S. Sentencing Guidelines ("USSG"), the purposes behind the Fair Sentencing Act of 2010 ("FSA"), and the goals of the U.S. Sentencing Commission ("USSC").[202] This Part argues that courts should interpret the two eligibility requirements for sentence reductions in favor of eligibility for defendants who avoided a mandatory minimum because of their substantial assistance to authorities.[203] Section A contends that a defendant's sentence is always "based on" the guideline range and courts should hold this requirement satisfied for crack cocaine offenders sentenced before the FSA.[204] Section B maintains that the "applicable guideline range" is the range calculated before adherence to the mandatory minimum, and that courts should hold Amendment 750 to have the effect of lowering defendants' "applicable guideline range."[205] Finally, Section C argues that the policy goals behind the FSA and the USSC further support eligibility for crack cocaine offenders sentenced prior to the enactment of the FSA.[206]

A. The "Based on" Requirement: Sentences Are "Based on" the Subsequently Lowered Guideline Range So Long as the Mandatory Minimum Was Not Actually Imposed

Courts deciding whether a defendant's sentence was "based on" a subsequently lowered guideline range should adopt the D.C. Circuit's analysis because it represents the most practical approach, reflects the realities of sentencing, and comports with the Sentencing Reform Act ("SRA") and the role of the USSG in federal sentencing.[207] Following this approach, a defendant's sentence

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[202] *See* Sentencing Reform Act of 1984, 28 U.S.C. § 911(b) (2012); Fair Sentencing Act of 2010, Pub. L. 111-220, § 2(a), 124 Stat. 2372, 2372 (codified at 21 U.S.C. § 841 (2012)); *In re* Sealed Case, 722 F.3d 361, 366–70 (D.C. Cir. 2013); U.S. SENTENCING GUIDELINES MANUAL, *supra* note 11, §§ 1B1.1(a)–(b), 1B1.10 cmt. 1(A), 5G1.1; Kosman, *supra* note 80, at 788–89 (stating that the USSC sought to establish a sentencing regime that provides certainty and fairness in sentencing and avoids unwarranted disparities between similarly situated defendants); Parks, *supra* note 9, at 1135–36 (arguing that the purpose of the FSA is to render fairer sentences to all defendants sentenced under previously unjust sentencing schemes).

[203] *See infra* notes 207–271 and accompanying text.

[204] *See infra* notes 207–229 and accompanying text.

[205] *See infra* notes 230–251 and accompanying text.

[206] *See infra* notes 252–271 and accompanying text.

[207] *See* Freeman v. United States, 131 S. Ct. 2685, 2688 (2011) ("Even where the judge varies from the recommended range, if the judge uses the sentencing range as the beginning point to explain the deviation, then the Guidelines are in a real sense a basis for the sentence."); Asher, *supra* note 21,

was "based on" the guideline range if it constituted a relevant part of the judge's analytical framework in imposing the sentence.[208] As long as the judge had discretion to depart below the mandatory minimum, the sentence was "based on" the guideline range to some extent.[209] Therefore, when a defendant avoids a mandatory minimum for their substantial assistance to authorities, courts should hold this requirement satisfied.[210]

On some level, the guideline range always affects a judge's sentencing decision.[211] Judges must calculate the range in every case regardless of the operation of a mandatory minimum.[212] Both the resentencing statute and the USSG authorize judges to depart below the defendant's guideline range and the mandatory minimum for a defendant's substantial assistance to authorities, which they may exercise regardless of the government's recommendation.[213] Therefore,

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at 1006 (arguing that a per se rule denying sentence reductions to defendants who agreed to a particular sentence in a plea agreement misinterprets the effects of the USSG); Siegfried, *supra* note 59, at 1805 (noting that failing to calculate the guideline range constitutes reversible error and that all sentencing proceedings must "unfold in the shadow of the Guidelines").

[208] *See Freeman*, 131 S. Ct. at 2688 ("Even where the judge varies from the recommended range, if the judge uses the sentencing range as the beginning point to explain the deviation, then the Guidelines are in a real sense a basis for the sentence."); *In re Sealed Case*, 722 F.3d at 365 (holding that a sentence is "based on" the guideline range to whatever extent the range constituted a relevant part of the judge's analytical framework).

[209] *See* Siegfried, *supra* note 59, at 1838–39 (arguing that because all sentencing proceedings begin by calculating a defendant's guideline range, sentences agreed upon in plea agreements necessarily integrate the guideline range). The extent to which guideline range affects sentences when defendants avoid a mandatory minimum for their substantial assistance to authorities, unlike those agreed upon in plea agreements, may not be easily ascertained. *See* United States v. Munn, 595 F.3d 183, 195 (4th Cir. 2010) (noting that, even though the sentencing court made no explicit reference to the guideline range, it does not mean that the court did not rely on the guideline range in imposing a sentence). Even if the sentencing judge used the mandatory minimum as the starting point for the departure and only considered the circumstances of the defendant's assistance in granting the departure, the guideline range may nonetheless have some effect on the ultimate sentence. *See* Julian A. Cook, III, *Plea Bargaining, Sentence Modifications, and the Real World*, 48 WAKE FOREST L. REV. 65, 78 (2013) (arguing that it is "difficult to ignore" § 3553's instruction to consider the USSG when imposing a sentence).

[210] *See* Cook, *supra* note 209, at 78; Siegfried, *supra* note 59, at 1838–39.

[211] *See*, *e.g.*, United States v. Savani, 733 F.3d 56, 71 (3d Cir. 2013) (Fuentes, J., concurring) (noting that even though the Third Circuit had previously ruled that a sentencing judge should only consider the defendant's assistance in granting a departure below a mandatory minimum, the defendant's sentence may still be "based on" the USSG because the seriousness of the offense—as reflected in the guideline range—may limit the departure); Siegfried, *supra* note 59, at 1823–25 (arguing that, because the text of the USSG does not say that a the defendant's sentence must be "exclusively based on," "largely based on," or "based at least in part on" the guideline range, the defendant may be eligible for a reduction in some circumstances).

[212] *See* U.S. SENTENCING GUIDELINES MANUAL, *supra* note 11, § 1B1.1(a)(7) (directing judges to "[d]etermine the guideline range in Part A of Chapter Five that corresponds to the offense level and criminal history category determined above").

[213] *See* Sentencing Reform Act of 1984, 18 U.S.C. § 3553(e) (2012) (providing a sentencing judge with "limited authority" to impose a sentence below a statutory mandatory minimum to reflect a defendant's substantial assistance to authorities); U.S. SENTENCING GUIDELINES MANUAL, *supra* note

adopting an approach that recognizes the effect of the guideline range makes the most sense and avoids having to read the sentencing judge's mind to discern whether the range served as the foundation for the sentence.[214]

Regardless of the approach taken by the sentencing court in departing from the mandatory minimum and guideline range for the defendant's substantial assistance, the sentence is "based on" the range to some extent as long as the mandatory minimum was not imposed.[215] For example, in 2013, in *United States v. Williams*, the U.S. Court of Appeals for the Sixth Circuit reviewed the district court's decision to disregard the guideline range that would have applied to the defendant without a mandatory minimum.[216] The district court found the lowest offense level that corresponded with a guideline range containing the mandatory minimum, decreased the level by four, and imposed a sentence within the resulting guideline range.[217] Had the original range been lower, however, the court could have elected to depart further below the enhanced level.[218] Because the possible impact of a lower level is unknown, defendants deserve the benefit of this uncertainty by at least being eligible for a sentence reduction.[219]

11, § 5K1.1 (stating that a sentencing judge may depart from the USSG if the defendant has provided substantial assistance to authorities after considering a number of factors, including: the significance and usefulness of the defendant's assistance; the truthfulness, completeness, and reliability of the defendant's information or testimony; and any injury suffered or any risk of injury to the defendant or his or her family).

[214] *See Munn*, 595 F.3d at 195 (stating that even though the sentencing court made no explicit reference to the guideline range, it does not mean that the court did not rely on the guideline range in imposing the sentence); Ralph V. Seep, Annotation, *Validity and Construction of Provision of 18 U.S.C.A. § 3553(e) and U.S. Sentencing Guideline § 5K1.1*, 111 A.L.R. FED. 547 (1993) (noting that sentencing courts are not bound to use one specific method in granting a substantial assistance departure, and may use a lower offense category, a percentage, a flat number of months, or any other reasonable method); Kosman, *supra* note 80, at 811 (arguing that barring all defendants sentenced in accordance with a plea agreement from sentence reductions in light of crack cocaine amendments undervalues the role of the USSG in federal sentencing).

[215] *See In re Sealed Case*, 722 F.3d at 367; Cook, *supra* note 209, at 78.

[216] *See* United States v. Williams, 512 F. App'x 594, 598 (6th Cir. 2013).

[217] *Id.*

[218] *See* Sentencing Reform Act of 2010, § 3553(e); U.S. SENTENCING GUIDELINES, *supra* note 11, § 5K1.1. The statute allows substantial assistance departures below a mandatory minimum, but does not prescribe how to depart from the mandatory minimum or whether the guideline range may be considered in addition to the details of the defendant's assistance. *See* § 3553(e). It does, however, instruct courts to ensure that sentences still comport with the USSG. *See id.* The USSG list factors that courts may consider in making a departure, but notes that they are not exclusive. *See* U.S. SENTENCING GUIDELINES, *supra* note 11, § 5K1.1(a)(1)–(5).

[219] *See* Sentencing Reform Act of 2010, § 3553(e); *In re Sealed Case*, 722 F.3d at 370 (noting that the defendant's eligibility for a reduction does not entitle him to a lower sentence); U.S. SENTENCING GUIDELINES, *supra* note 11, § 5K1.1; Brian Crowell, Comment, *Amendment 706 to the U.S. Sentencing Guidelines: Not All It Was Cracked Up to Be*, 55 VILL. L. REV. 959, 984 (2010) (arguing that courts should not allow excessive formalism to undermine the USSC's intent to provide relief to defendants unfairly sentenced in accordance with the previous scheme); Siegfried, *supra* note 59, at 1828 (arguing that a defendant's sentence is "based on" the USSG to some extent as long as another guideline or statutory provision did not specifically set the sentence).

A lower range would have made even more of a difference in the 2013 U.S. Court of Appeals for the District of Columbia case, *In re Sealed Case*. In *In re Sealed Case*, the U.S. District Court for the District of Columbia *did* exercise its discretion to impose a sentence below both the mandatory minimum and guideline range.[220] Recognizing this, the D.C. Circuit held a defendant's sentence is "based on" a subsequently lowered guideline range if it constituted a relevant part of the judge's analytical framework.[221] Because the guideline range may have impacted the judge's imposition of the sentences in *In re Sealed Case*, as in *Williams*, the D.C. Circuit's approach reflects the realities of sentencing and should be adopted.[222]

The SRA and the role of the USSG in federal sentencing also support the D.C. Circuit's interpretation.[223] The SRA instructs courts to consider a variety of factual and policy concerns—including the overarching goals of the criminal justice system—in addition to the USSG when imposing a sentence.[224] Despite this instruction, courts still must impose a sentence within the guideline range unless extenuating circumstances exist.[225] Congress therefore placed immense importance on consideration of guideline ranges in imposing a sentence.[226] Moreover, the U.S. Supreme Court declared in 2007 in *Gall v. United States* that judges must begin all sentencing proceedings by calculating the guideline range to avoid a reversible error.[227] Because judges must always begin by calculating the guideline range, they likely consider the range in imposing a sentence even if a mandatory minimum comes into play.[228] As long as the judge had discretion to

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[220] *See In re Sealed Case*, 722 F.3d at 363–64.

[221] *See id.* at 365–66.

[222] *See id.* at 363–64 (noting that the sentencing judge stated "[I] will do somewhat of a reduction, not only from the 20 years, looking to what he would have had [with] the mandatory minimums, and then some reduction from what he would have gotten without the mandatory minimums, and I would do a sentence of 135 months, which I think is fair in the context of the record and what's involved in the particular case"); *Williams*, 512 F. App'x at 598 (describing how the sentencing judge first calculated the defendant's base offense level, then decreased the level by two for acceptance of responsibility, then reached a guideline range of 135 to 168 months imprisonment, *and then* accounted for the mandatory minimum); Cook, *supra* note 209, at 78 (arguing that it is "difficult to ignore" the mandates in § 3553 and USSG § 6B1.2(c) (concerning plea agreements), which instruct judges to consider the USSG when imposing a sentence); Siegfried, *supra* note 59, at 1838–39 (arguing that any sentence agreed upon in a plea agreement invariably takes into account the defendant's guideline range).

[223] *See* Sentencing Reform Act of 2010, § 3553(b)(4)–(5); Siegfried, *supra* note 59, at 1805.

[224] Sentencing Reform Act of 2010, § 3553(a)–(b).

[225] *Id.* § 3553(b)(1).

[226] *See id.* § 3553(b)(1) (stating that the court "shall" impose a sentence "of the kind, and within the [guideline] range" unless the court finds that there exist aggravating or mitigating circumstances not adequately taken into consideration by the USSC); Cook, *supra* note 209, at 78 (noting that it is "difficult to ignore the mandate[] contained in" § 3553(b)(1) that instructs district courts to consider the USSG when imposing a sentence).

[227] 552 U.S. 38, 49 (2007).

[228] *See Gall*, 552 U.S. at 49; *Sentencing Guidelines*, 40 GEO. L.J. ANN. REV. CRIM. PROC. 711, 769 (2011) (stating that although sentencing courts may impose a sentence outside a guideline range

depart below the mandatory minimum, the sentence was "based on" the guideline range to some extent, and courts should hold as much.[229]

B. The "Applicable Guideline Range" Requirement: The Guideline Range Is the Defendant's Offense Level and Criminal History Category Before Applying Mandatory Minimums

Courts also should adopt the D.C. Circuit's approach to determining whether an amendment had the effect of lowering a defendant's "applicable guideline range" when he or she avoided a mandatory minimum through a substantial assistance departure because it best comports with the text of the USSG.[230] This approach requires courts to calculate the "applicable guideline range" using the defendant's offense level and criminal history, which the mandatory minimum does not replace.[231] Defining the "applicable guideline range" in this way complies with the USSC's definition, policy statement, and the steps for applying the USSG.[232] Therefore, courts should hold this requirement satisfied when a defendant receives a substantial assistance departure below a mandatory minimum.[233]

First, defining "applicable guideline range" as the range calculated by the defendant's offense level and criminal history category comports with the USSC's definition of "applicable guideline range" in Amendment 759.[234] The definition logically alludes to step seven because it tracks the "offense level" and "criminal

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to account for statutory concerns, courts still must consider the guideline range in imposing the sentence).

[229] *See* Crowell, *supra* note 219, at 984 (arguing that courts should not allow excessive formalism to undermine the USSC's intent to provide relief to defendants unfairly sentenced in accordance with the previous scheme); Siegfried, *supra* note 59, at 1828 (noting that the calculation of the defendant's base offense level and criminal history category produces the applicable guideline range).

[230] *See* Kreiner, *supra* note 9, at 895–96 (arguing that the text of the USSG shows that the "applicable guideline range" refers to the range derived from step seven of the Application Instructions).

[231] *See In re Sealed Case*, 722 F.3d at 367–70.

[232] *See* U.S. SENTENCING GUIDELINES MANUAL, *supra* note 11, § 1B1.1(a), § 1B1.10, cmt. 1(A), § 5G1.1; Kreiner, *supra* note 9, at 895–96.

[233] *See* Kreiner, *supra* note 9, at 895–96.

[234] *See* U.S. SENTENCING GUIDELINES MANUAL, *supra* note 11, § 1B1.10, cmt. n.1(A) (defining the "applicable guideline range" as "the guideline range that corresponds to the offense level and criminal history category determined pursuant to § 1B1.1(a), which is determined before consideration of any departure provision in the Guidelines Manual or any variance"); Kreiner, *supra* note 9, at 908. One scholar concluded that nominal career offenders are not eligible for sentence reductions in light of the reductions to the crack cocaine guideline ranges because their "applicable guideline range" is the career offender range, not the crack cocaine range. Kreiner, *supra* note 9, at 870. When defendants avoid a mandatory minimum through a substantial assistance departure, however, no other guideline range is involved. *See* Sentencing Reform Act of 1984, 18 U.S.C. § 3553(e) (2012) (providing limited authority for courts to impose a sentence below a mandatory minimum for a defendant's substantial assistance to authorities, but that the sentence must still be imposed in accordance with the USSG and relevant policy statements promulgated by the USSC); U.S. SENTENCING GUIDELINES MANUAL, *supra* note 11, § 5K1.1 (allowing courts to depart from the USSG for a defendant's substantial assistance to authorities).

history category" language in that step.[235] If the USSC intended the mandatory minimum to become the new "applicable guideline range," it would have explicitly done so.[236] Although the definition refers to § 1B1.1(a) in its entirety, the USSC likely did not see the need to refer to the specific steps because it clearly refers to the range calculated by the defendant's offense level and criminal history category.[237] Moreover, replacing the "applicable guideline range" with the mandatory minimum would render this language superfluous, as the statute does not assign a new offense level or criminal history category or even refer to those values at all.[238]

Second, policy statement § 1B1.10's reference to mandatory minimums as an example of when an amendment does not lower the defendant's "applicable guideline range" does not bar defendants who avoided the mandatory minimum for their substantial assistance.[239] This language most logically refers to the situation where a judge had no choice but to impose the mandatory minimum sentence, making the defendant's guideline range irrelevant.[240] When the defendant receives a substantial assistance departure, however, the judge has discretion to

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[235] *See* U.S. SENTENCING GUIDELINES MANUAL, *supra* note 11, § 1B1.1(a)(7) (instructing courts to determine the guideline range from the sentencing table that "corresponds to the *offense level* and *criminal history category* determined above") (emphasis added)); *id.* § 1B1.10, cmt. 1(A) (defining the "applicable guideline range" as "the guideline range that corresponds to the *offense level* and *criminal history category* determined pursuant to § 1B1.1(a)" (emphasis added)); Kreiner, *supra* note 9, at 908 (arguing that the USSC's definition of the "applicable guideline range" clarifies that the range calculated in the sentencing table constitutes the "applicable guideline range").

[236] *See In re Sealed Case*, 722 F.3d at 367 (noting that that defendant's guideline range is calculated at step seven and, at step eight—if the mandatory minimum is greater than anything in the guideline range—the mandatory minimum becomes the guideline sentence); U.S. SENTENCING GUIDELINES MANUAL, *supra* note 11, § 1B1.1(a)(7), § 1B1.10, cmt. 1(A) (directing courts to locate the range corresponding to the defendant's offense level and criminal history category in the sentencing table); Kreiner, *supra* note 9, at 908 (arguing that § 1B1.10, cmt. n.1(A), which defines "applicable guideline range," clarifies that the range calculated pursuant to the sentencing table constitutes the "applicable guideline range").

[237] *See supra* note 235 and accompanying text (noting how the USSC's definition of the "applicable guideline range" tracks the "offense level" and "criminal history category" language used at step seven).

[238] *See* Controlled Substances Act, 21 U.S.C. § 841(b)(1)(A)(viii), (B)(viii) (2012); Kreiner, *supra* note 9, at 908.

[239] *See* U.S. SENTENCING GUIDELINES MANUAL, *supra* note 11, § 1B1.1(a)(7), § 1B1.10, cmt. 1(A); § 1B1.10, cmt. n.1(A) (providing that a sentence reduction is *not* authorized when an amendment to the USSG does not have the effect of lowering the defendant's applicable guideline range because of "the operation of another guideline or statutory provision (e.g., a statutory mandatory minimum term of imprisonment)" (emphasis added)); Crowell, *supra* note 219, at 979–81 (contending that where judges are allowed to consider the seriousness of the defendant's offense and the original crack cocaine guideline range when determining the substantial assistance departure, the "applicable guideline range" may not automatically be the mandatory minimum).

[240] *See* U.S. SENTENCING GUIDELINES MANUAL, *supra* note 11, § 1B1.1(a)(7), § 1B1.10, cmt. 1(A); § 1B1.10, cmt.1(A); Crowell, *supra* note 219, at 979–80; Siegfried, *supra* note 59, at 1828.

impose a lower sentence and the guideline range still may be relevant.[241] Therefore, § 1B1.10 does not categorically bar eligibility for a sentence reduction in these situations.[242]

Policy statement § 1B1.10(b) also confirms that the mandatory minimum does not become the "applicable guideline range."[243] Although courts cannot reduce a defendant's sentence below the low end of the amended guideline range, defendants who received a substantial assistance departure below the original range may receive a comparable reduction below the new range.[244] This section does not bar reductions for defendants subject to a mandatory minimum when the mandatory minimum was not imposed.[245] Defendants who received substantial assistance departures below their guideline ranges should therefore be eligible for sentence reductions even if a mandatory minimum was part of the sentencing calculation.[246]

Lastly, the reference to the mandatory minimum as the "guideline sentence" in § 5G1.1, which instructs how to account for mandatory minimums at step eight, supports this interpretation.[247] A mandatory minimum trumps the guideline range when it lies above the range in the absence of a substantial assistance departure.[248] When this occurs, according to § 5G1.1, the mandatory minimum becomes the "guideline sentence" and not the "applicable guideline range."[249] To assert otherwise would ignore the fact that mandatory minimums are, by definition, prescribed sentences and not ranges at all.[250] Therefore, the "applicable guideline range" remains the range calculated at step seven using the defendant's

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[241] *See* Sentencing Reform Act of 1984, 18 U.S.C. § 3553(b)(1) (2012); U.S. SENTENCING GUIDELINES MANUAL, *supra* note 11, § 5K1.1; Asher, *supra* note 21, at 1040 ("[The USSC and] Congress intended primarily to exclude from coverage defendants sentenced *pursuant* to statutory minimums, or for whom other sentencing overrides applied, such as the career offender enhancement." (emphasis added)).

[242] *See* U.S. SENTENCING GUIDELINES MANUAL, *supra* note 11, § 1B1.1(a)(7), § 1B1.10, cmt. 1(A); § 1B1.10, cmt. 1(A); Asher, *supra* note 21, at 1040.

[243] *See* U.S. SENTENCING GUIDELINES MANUAL, *supra* note 11, § 1B1.1(a)(7), § 1B1.10, cmt. 1(A); § 1B1.10(b)(2)(A)–(B).

[244] *Id.*

[245] *See id.*; Asher, *supra* note 21, at 1040 (noting that the drafting history of the resentencing statute, 18 U.S.C. § 3582(c)(2), and related USSC policy statements suggest that Congress intended to exclude from coverage defendants *actually* sentenced pursuant to statutory minimums).

[246] *See* Asher, *supra* note 21, at 1040; Siegfried, *supra* note 59, at 1823.

[247] *See* U.S. SENTENCING GUIDELINES MANUAL, *supra* note 11, § 5G1.1(b)

[248] *See id.* ("Where a statutorily required minimum sentence is greater than the maximum of the applicable guideline range, the statutorily required minimum sentence shall be the guideline sentence.").

[249] *Id.*; 2A NORMAN J. SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 46:6 (7th ed. 2008) ("[C]ourts do not construe different terms within a statute to embody the same meaning.").

[250] *See* Erik Luna & Paul G. Cassell, *Mandatory Minimalism*, 32 CARDOZO L. REV. 1, 10–11 (2010) (noting that mandatory minimums create certain, predictable, and harsh sentences that warn offenders of the consequences of their behavior).

offense level, criminal history category, and the sentencing table, which amendments to the USSG *do* have the effect of lowering, rendering the defendant eligible for a sentence reduction.[251]

C. Effectuating the "Fairness" of the Fair Sentencing Act: Eligibility for Crack Cocaine Offenders Furthers the Policy Goals Behind the FSA, the USSC, and the USSG

Holding defendants who avoided a mandatory minimum for their substantial assistance to authorities eligible for sentence reductions—especially in the context of crack cocaine offenses—also advances the policy goals behind the FSA and the USSC.[252] This interpretation ensures that defendants sentenced in accordance with the harsher 100:1 crack-powder cocaine disparity receive the fairer sentences they deserve.[253] This interpretation further reduces unwarranted sentencing disparities which Congress tasked the USSC with preventing.[254] Overall, allowing unfairly sentenced crack cocaine offenders who helped authorities in investigating or prosecuting other offenders to move for reduced sentences furthers the goals of the criminal justice system.[255] Denying these defendants sentence reductions based on a procedural hurdle and a misreading of the USSG undermines those goals.[256]

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[251] *See In re Sealed Case*, 722 F.3d at 367–70; Kreiner, *supra* note 9, at 895–96.

[252] *See* Parks, *supra* note 9, at 1135–36 (noting that the FSA was passed to restore fairness, which has been missing from federal cocaine sentencing for over twenty years and has subjected thousands of defendants to sentences that have now been determined to be unjust); Kosman, *supra* note 80, at 788–89 (stating that the USSC sought to fulfill the congressional objectives of providing certainty and fairness in sentencing and avoiding unwarranted disparities among defendants with similar criminal histories who have been found guilty of similar criminal conduct). Congress specifically mentioned departures below mandatory minimums for a defendant's substantial assistance to authorities in describing the duties of the USSC. *See* 28 U.S.C. § 994(n) (2012) ("The [USSC] shall assure that the [USSG] reflect the general appropriateness of imposing a lower sentence than would otherwise be imposed, including a sentence that is lower than that established by statute as a minimum sentence, to take into account a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense.").

[253] *See* Ryan E. Brungard, Comment, *Finally, Crack Sentencing Reform: Why It Should Be Retroactive*, 47 TULSA L. REV. 745, 747 (2012) (arguing that the FSA represents a just change in federal cocaine sentencing and that it should apply retroactively to defendants previously sentenced under the more stringent sentencing laws because such defendants deserve to benefit from the fairer legislation, which better assigns punishment according to the appropriate level of culpability).

[254] *See* Sentencing Reform Act of 1984, 28 U.S.C. § 991(b)(1)(B) (2012); *see also* Kosman, *supra* note 80, at 810 ("[T]he crack amendment marked a long-overdue change to a sentencing regime that drastically overpunished crack offenders relative to their peers.").

[255] *See* Cynthia Kwei Yung Lee, *Prosecutorial Discretion, Substantial Assistance, and the Federal Sentencing Guidelines*, 42 UCLA L. REV. 105, 122–23 (1994) (arguing that denying defendants substantial assistance departures through unfettered prosecutorial discretion undermines the goals of fairness, certainty, and avoiding unwarranted disparities in sentencing).

[256] *See* Lee, *supra*, note 255, at 122–23 (noting that disparities among similarly situated defendants can result even with the use of well-intentioned internal guidelines when the guidelines are not applied uniformly); Hyser, *supra* note 70, at 534 (arguing that defendants convicted of crack cocaine

Courts should consider the contentious crack-powder cocaine disparity in effect before the FSA in deciding whether an offender is eligible for a sentence reduction.[257] The FSA, which reduced the 100:1 crack-powder cocaine disparity to 18:1 in recognition of the unjustness of the previous scheme, sought to provide relief to defendants sentenced in exactly this situation.[258] Defendants sentenced under the harsher, pre-FSA mandatory minimums cannot benefit from the statutory remedy as the U.S. Supreme Court has held it to be non-retroactive.[259] Therefore, Amendment 750 provides the only hope for relief for defendants.[260]

Withholding sentence reductions from some defendants who avoided a mandatory minimum for their substantial assistance to authorities and not others also undermines the USSC's goals.[261] Congress established the USSC to ensure certainty and fairness in sentencing and reduce unwarranted disparities between similarly situated defendants.[262] Adopting an interpretation of the sentence reduction requirements in favor of eligibility would limit disparities and produce consistent, fair results for all defendants sentenced before the FSA.[263]

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offenses are no less entitled to sentence reductions than those who had the good fortune to have a sentencing date in late August 2010, after the passage of the FSA).

[257] *See* Brungard, *supra* note 253, at 771 (contending that it is "absurd" to deny incarcerated crack cocaine offenders the benefits of the lesser penalties when they are the ones who have paid the price for Congress's harsh policy choices, now determined to be unduly severe); Parks, *supra* note 9, at 112–16 (acknowledging that Congress implemented the 100:1 ratio based on a fear of the unknown consequences of crack cocaine and that the FSA exposed the prior injustices plaguing federal sentencing for offenses involving crack cocaine).

[258] *See* Brungard, *supra* note 253, at 747; Parks, *supra* note 9, at 1135–36.

[259] *See* Dorsey v. United States, 132 S. Ct. 2321, 2336 (2012) (holding that the FSA's increased quantities necessary to trigger the five- and ten-year mandatory minimums for crack cocaine offenses are not retroactive and defendants sentenced in accordance with the Controlled Substances Act's ("CSA's") prior quantities cannot seek a sentence reduction after the FSA).

[260] *See id.*; Hyser, *supra* note 70, at 522 (noting how the U.S. Supreme Court in *Dorsey* had sympathy for the defendants in the case, who "lost the temporal roll of the cosmic dice" since they had no other remedy).

[261] *See* Kosman, *supra* note 80, at 788–89. In analyzing the impact the crack cocaine guideline amendments would have if made retroactive, the USSC listed as an eligibility criterion that the offender's sentence was greater than any relevant mandatory minimum "*unless* . . . the offender received a departure under § 5K1.1 for substantial assistance." Letter from Glen Schmitt et al., to the U.S. Sentencing Comm'n on an Analysis of the Impact of the Crack Cocaine Amendment if Made Retroactive (Oct. 3, 2007) (available at http://www.ussc.gov/sites/default/files/pdf/research/retroactivity-analyses/impact-analysis-crack-amendment/20071003_Impact_Analysis.pdf, *archived at* http://perma.cc/42UP-DSD5).

[262] *See* Sentencing Reform Act of 1984, 28 U.S.C. § 991(b)(1)(B) (2012) ("The purposes of the United States Sentencing Commission are to . . . provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices . . . .").

[263] *See* Brungard, *supra* note 253, at 747; Kosman, *supra* note 80, at 788–89; *see also supra* notes 135–139, 145–149, 161–166 and accompanying text (describing three similarly situated defendants

Moreover, penalizing prisoners who helped authorities apprehend other offenders runs counter to the purpose of substantial assistance departures and the goals of the criminal justice system.[264] Courts grant substantial assistance departures to reward defendants who help authorities.[265] Denying these defendants sentence reductions and allowing them for defendants who did not help authorities seems counterintuitive and counterproductive.[266] Withholding sentence reductions from some defendants who received departures below the mandatory minimum and not others also undermines the USSC's goals.[267] All things considered, allowing sentence reductions for crack cocaine offenders sentenced under the unduly harsh sentencing scheme before the FSA who provided substantial assistance to authorities supports justice.[268]

It is also important to remember that not all defendants held eligible for sentence reductions will receive one.[269] Courts still exercise their discretion in determining whether a reduction is warranted in each case.[270] Crack cocaine of-

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who avoided a mandatory minimum for their substantial assistance to authorities, only one of whom received a sentence reduction).

[264] *See* 18 U.S.C. § 3553(a) (2012) (stating that courts must impose sentences that are "sufficient, but not greater than necessary, to comply with the purposes" of the criminal justice system, including, *inter alia*, the nature and circumstances of the offense, the history and characteristics of the defendant, to promote respect for the law, and to protect the public from further crimes of the defendant); U.S. SENTENCING GUIDELINES MANUAL, *supra* note 11, § 5K1.1 ("Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines."); Lee, *supra*, note 255, at 108 (noting that USSG § 5K1.1 allows prosecutors the discretion to grant leniency to defendants who assist authorities); Neal Kumar Katyal, *Conspiracy Theory*, 112 YALE L.J. 1307, 1389 (2003) (stating that the government rewards criminal defendants for information on someone's guilt or innocence).

[265] *See* Lee, *supra* note 255, at 128; Benjamin A. Naftalis, Note, *"Queen for a Day" Agreements and the Proper Scope of Permissible Waiver of the Federal Plea-Statement Rules*, 37 COLUM. J.L. & SOC. PROBS. 1, 10 (2003) (stating that federal prosecutors determine whether defendants are given a "reward for [their] cooperation" with authorities).

[266] *See* Lee, *supra*, note 255, at 122–23; John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2388 (2003) (stating generally that the U.S. Supreme Court has allowed judges to deviate from clear statutory text when a certain application would produce absurd results).

[267] 18 U.S.C. § 3553(a)(2)(A)–(D).

[268] *See* Brungard, *supra* note 253, at 747 (arguing that the FSA brought justice back to federal crack cocaine sentencing and should apply retroactively); Kosman, *supra* note 80, at 788–89 (noting that Congress sought to ensure certainty and fairness in sentencing, which appropriately comports with the defendant's culpability, by establishing the USSC); Parks, *supra* note 9, at 1135–36 (asserting that the purpose of the FSA was to provide fairer sentences to all defendants sentenced in accordance with the harsh 100:1 ration in the CSA before the FSA's enactment).

[269] *See* 18 U.S.C. § 3582(c)(2); *In re Sealed Case*, 722 F.3d at 370 ("Of course, the appellant's eligibility for a reduction does not *entitle* him to a lower sentence."); U.S. SENTENCING GUIDELINES MANUAL, *supra* note 11, § 1B1.10(b)(1) (providing instructions for determining "whether, and to whatever extent," a sentence reduction is warranted).

[270] *See* 18 U.S.C. § 3582(c)(2) (providing that where a defendant has been sentenced in accordance with a subsequently lowered guideline range, the court *may* reduce the sentence, after considering the factors set forth in § 3553(a) to the extent that they are applicable, and only if the reduction is consistent with relevant policy statements issued by the USSC); U.S. SENTENCING GUIDELINES

fenders sentenced before the FSA who avoided a mandatory minimum for their substantial assistance to authorities should therefore, at the very least, be eligible for a sentence reduction.[271]

CONCLUSION

Courts should hold crack cocaine offenders who avoided a mandatory minimum for their substantial assistance to authorities eligible for sentence reductions in light of the Fair Sentencing Act of 2010 ("FSA"). On some level, a defendant's sentence in these situations is always "based on" the guideline range, and an interpretation of the "applicable guideline range" as the range calculated by the defendant's offense level and criminal history category best comports with the text of the U.S. Sentencing Guidelines. Moreover, these interpretations effectuate the U.S. Sentencing Commission's goal to eradicate sentencing disparities for similarly situated defendants and the FSA's purpose in rendering fairer sentences for defendants sentenced under an unduly harsh sentencing scheme. Otherwise, defendants unfairly sentenced before the FSA who helped authorities in the investigation or prosecution of another offender will fall through the "cracks."

CATHERINE DIVITA

MANUAL, *supra* note 11, § 1B1.10(b)(1) (instructing that when determining whether, and to what extent, a reduction in a defendant's term of imprisonment is warranted, courts must consider the amended guideline range that would have been applicable to the defendant if the amendment(s) to the USSG had been in effect at the time the defendant was sentenced).

[271] United States v. Savani, 733 F.3d 56, 70 (3d Cir. 2013) (noting that the "clear statutory purpose" of the FSA was to "lower the sentences of *all* crack cocaine offenders" (emphasis added)); Kosman, *supra* note 80, at 788–89 (arguing that defendants sentenced in accordance with plea agreements should receive the benefit of fairer USSG provisions); American Bar Association, *Crack Cocaine Sentencing*, HUM. RTS., Summer 2011, at 10, 10 (noting that the judge decides whether a defendant actually receives a sentence reduction and by how much after considering many factors, including whether reducing the defendant's sentence would pose a risk to public safety).